Supreme Court, U.S.
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Supreme Court of the United States

THE PINEY RUN PRESERVATION ASSOCIATION,

Petitioner,

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Does the "permit shield" provision in the Clean Water Act allow a permit holder to discharge pollutants not listed on its National Pollutant Discharge Elimination System ("NPDES") permit?

2. May a federal court construe the "permit shield" provision in the Clean Water Act to license a permitholder to discharge a pollutant in quantities that violate the applicable state water quality standards, when that pollutant is not listed on its NPDES permit?

3. Does a federal court have the power to make legal the discharge of a pollutant not listed on a NPDES permit in quantities which the state permitting agency could not have permitted under its governing state law?

LIST OF PARTIES TO PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, The Piney Run Preservation Association, Inc., is a § 501(c)(3) not-for-profit corporation. It has no parent corporation and is not owned, wholly or in part, by any publicly-traded corporation.

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CITATION TO OFFICIAL, UNOFFICIAL REPORTS OF OPINIONS/ORDERS

The opinion of the United States Court of Appeals for the Fourth Circuit in *The Piney Run Preservation Association, Inc. v. County Commissioners of Carroll County, Maryland,* is published at 268 F.3d 255 (4th Cir. 2001). The opinions of the district court are published at 50 F.Supp.2d 443 (D. Md. 2000) and 82 F.Supp.2d 464 (D. Md. 2001).

The citation to the unpublished opinion in a related state case, *Woodward, et al. v. The Maryland Department of Environment,* is Maryland Court of Special Appeals, No. 1660 (September Term 1997).

JURISDICTION STATEMENT

On October 10, 2001, the United States Court of Appeals for the Fourth Circuit decided *The Piney Run Preservation Association, Inc. v. County Commissioners of Carroll County, Maryland,* 268 F.3d 255 (4th Cir. 2001). On November 6, 2001, that court denied a timely-filed Petition for Rehearing and Petition for Rehearing *en Banc.* (App. 99) Petitioner files this Petition for a Writ of *Certiorari* within ninety days of that denial. *See* 28 U.S.C. § 2101(c); S.Ct.R. 13.3.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

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33 U.S.C. § 1370, (App. 104)

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STATEMENT OF THE CASE

This Clean Water Act citizen suit involves a wastewater treatment plant's discharge of warm effluent to a trout stream in Carroll County, Maryland. The stream is the Piney Run, a tributary of the Loch Raven Reservoir. The State of Maryland has classified the Piney Run as "Class IIIP " waters to be protected for the growth and propagation of trout and as a source of drinking water. (App. 33)

The Petitioner here, and Plaintiff below, is The Piney Run Preservation Association, Inc. ("Association"). The Association was formed to further the preservation of the stream and its watershed, and its members include riparian owners downstream of the plant. The Respondent, and Defendant below, is the entity known as The Commissioners of Carroll County ("Carroll County"). Carroll County owns and operates the wastewater treatment plant.

As the plant operator, Carroll County holds a National Pollutant Discharge Elimination System ("NPDES") permit that was issued by the Maryland Department of the Environment ("MDE") on March 1, 1990. MDE issued the permit "[p]ursuant to the provisions of Title 9 of the Environment Article, Annotated Code of Maryland." Section 9-324 of the statute empowers MDE to issue NPDES permits only upon a showing that the applicant's discharge will not violate water quality standards. (App. 106) Regulations in Part 122 of 40 C.F.R. also governed MDE's issuance of the permit. Section 122.4 provides that "No [NPDES] permit may be issued: ...(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." (App. 105)

Carroll County's permit contains both "Special Conditions" and "General Conditions." (App. 131-39) Special Condition I A. grants numerical effluent limitations for BOD5, Suspended Solids, TKN, Total P, Fecal Coliforms, Dissolved Oxygen and pH. A footnote to the "effluent limitations" heading provides: "discharge of pollutants not shown shall be illegal." (App. 132) Special Condition I A does not grant a numerical effluent limitation for heat. General

Condition II. 12 states: "Nothing in this permit shall be construed to ... relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority of Section 510 of the Clean Water Act of 1977 as amended." (App. 139) Section 510, 33 U.S.C. § 1370, preserves Maryland's rights to adopt and enforce its own rules that may be more stringent than the federal standard.

The applicable state regulations appear in the Code of Maryland Regulations (hereinafter "COMAR"). COMAR contains a regulation mandating the Water Quality Standard for temperature in Class III and IIIP waters (hereinafter "water quality standard" or "thermal criterion"). (App. 110-12) The thermal criterion requires that the temperature of the Piney Run (a) must not exceed 20°C (68°F) or the ambient temperature, whichever is higher, and (b) must not create a "thermal barrier" that "adversely affects aquatic life." COMAR 26.08.02.03-3D(3). Maryland also promulgated numerical limits applicable to the Piney Run for fecal coliforms, dissolved oxygen, pH, turbidity, Total Residual Chlorine and thirty toxic confirm substances. COMAR 26.08.02.03-2.

In 1991, Carroll County applied for a modification to its 1990 permit because it wished to increase the volume of its discharges, and MDE gave notice of its determination to grant the modification. Like the 1990 permit, the modification did not list heat. Individual landowners contested the permit modification because MDE had never determined either whether the existing discharges violated the stream's water quality standard for temperature or whether the proposed increase would violate that

standard. MDE argued at that time that wastewater treatment plants were exempt from the thermal criterion. *Woodward, et al. v. The Maryland Department of Environment*, Maryland Court of Special Appeals, No. 1660 (September Term 1997) (App. 74)

In 1993, during the modification proceedings, MDE gathered temperature data which revealed that the temperature of Carroll County's effluent exceeded that of the stream. The data also showed that the effluent exceeded the 20°C (68°F) prong of the water quality standard. (App. 71-73) Those data were introduced in the state permitting proceedings. In September 1998, the Maryland Court of Special Appeals vacated the permit modification and remanded the case to MDE. (App. 96) The *Woodward* court held that Maryland law did not authorize MDE to issue an NPDES permit in the absence of a determination that "the discharge met the thermal criterion, pursuant to the command in EN § 9-324." (App. 93) The court ordered MDE to acquire the temperature data necessary to both quantify the ambient temperature prong of the standard and determine the effect of the effluent on the temperature of the stream. (App. 95-96)

In 1998, the Association mailed 60-day letters in accordance with 33 U.S.C. § 1365 to inform MDE, the United States Environmental Protection Agency, and Carroll County of its intention to file a citizen suit under the Clean Water Act. Neither agency diligently prosecuted Carroll County. On September 16, 1998, the Association filed this citizen suit in the United States District Court for the District of Maryland. Citing MDE's 1993 temperature readings, the Association alleged that Carroll County was

continuously violating both its permit and the Clean Water Act by adding heat to the waters without a permit listing that pollutant.

In 1996, Carroll County began measuring both the temperature of Piney Run upstream of the plant and the temperature of the effluent. The Association acquired the 1996-98 temperature data in discovery in this case. Those data showed that Carroll County frequently added heat to the Piney Run. The County's thermal pollution of the stream occurred on 371 of the 397 days that the temperature was measured between July 10, 1996 and December 31, 1998. On 183 of those days, the discharge exceeded both 20°C (68°F) and the temperature of the upstream water.[1]

On March 17, 1999, the Association moved for partial summary judgment on liability. Carroll County did not introduce any evidence that it had disclosed its discharges of heat to MDE before the issuance of the 1990 permit. Instead, the County cross-moved for summary judgment, admitted that the permit did not list heat, introduced the *Woodward* opinion, argued that it could only be liable for discharges in excess of the water quality standard, and urged delay until action by MDE. Carroll County argued that "the omission of thermal effluent limitations from the County's NPDES permit does not lead to the conclusion that the Plant's discharge is free to discharge heat without limitations. To the contrary, the water quality regulations promulgated by MDE set forth criteria linked to the various use classifications assigned to the waters of the

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[1] The Piney Run did not have a mixing zone at the point of discharge because the amount of discharge dominates the base flow of the stream. Thus, the discharge itself must satisfy the water quality standards.

state, including the Piney Run." Carroll County's Cross-Motion for Summary Judgment at p. 7. The Association argued that every addition of heat through the discharge pipe was an unpermitted addition of the pollutant. Alternatively, the Association argued that Carroll County violated the water quality standard on the 183 days that the temperature of the effluent exceeded both 20°C (68°F) and the temperature of the ambient receiving water.

On May 20, 1999, the district court granted partial summary judgment to the Association. The court found 183 violations: one violation for each day on which the discharge exceeded the water quality standard. (App. 62) The district court held that a reasonable interpretation of the word "ambient" in the regulation was the "upstream temperature of the Piney Run" and found violations for each day on which the discharge exceeded both 20°C (68°F) and the upstream temperature. (App. 61) Carroll County moved for reconsideration. It still did not introduce any evidence that it had disclosed its addition of heat to MDE before the 1990 permit was issued. The court denied the motion.

In January, 2000, the district court, sitting as fact finder, conducted a trial on the relief aspects of its 1999 summary judgment. Because Carroll County was still adding heat to the stream, the court also heard liability evidence on the allegations of newer violations. Carroll County did not introduce any documents to the effect that it had disclosed its additions of heat to MDE before the issuance of the 1990 permit. It called one MDE witness, James Dieter, who began his employment at MDE in 1997, seven years after MDE issued the permit. (App. 114) It also called James

Slater, a County employee who began his employment in May 1990, two months after the 1990 permit had been issued. (App. 120) Neither witness identified any written disclosure to MDE by March 1990 that the temperature of the County's effluent would exceed both 20°C (68°F) and the temperature of the stream. Neither witness specified any such oral disclosure as of March 1990. Thus, Carroll County introduced no evidence as to any knowledge by MDE in 1990 that the County would add heat to the stream in the amounts and at the temperatures proven by the County's 1996-1999 data. Indeed, Mr. Dieter testified that *Woodward, et al. v. The Maryland Department of Environment* had caused MDE to begin to assess whether wastewater treatment plants were discharging thermal pollution. (App. 119) *Woodward* was decided eight years after the 1990 permit was issued.

Consistently with its earlier ruling, the district court found additional violations for the 107 days on which the discharges exceeded the water quality standard, and not for the other days on which Carroll County had added heat. (App. 43) The court's opinion contained no finding of fact that Carroll County had disclosed its additions of heat to MDE before the issuance of the 1990 permit. The court recounted the testimony that Carroll County "recognized thermal discharges as a potential problem beginning as early as 1992." (App. 48)

Carroll County appealed to the United States Court of Appeals for the Fourth Circuit and was joined by numerous industry associations as *amici*. A three-judge panel interpreted the "permit shield" provision in 33 U.S.C. § 1342(k) to mean that a discharger may discharge any pollutant not listed on the NPDES

permit if the permittee "adequately disclosed," and the permitting authority "reasonably contemplated," the discharge of that pollutant. (App. 31) The court then found *de novo* that Carroll County had "adequately disclosed," and MDE had "reasonably contemplated," the discharge of heat. The court cited only the trial testimony of Messrs. Dieter and Slater. (App. 31) In its published opinion, the court further concluded as a matter of law that the fact of "reasonable disclosure" of a pollutant coupled with its omission from in the permit necessarily implies the agency's acquiescence to the discharge of that pollutant, rather than a decision not to permit it, and that an agency's mere "contemplation" of a discharge serves to incorporate unlimited amounts of that discharge into the permit. The court did not consider the holding in *Woodward* that MDE had not addressed the plant's thermal discharge. The court did not address Mr. Dieter's testimony that MDE only began to consider such thermal discharges in 1998. The court did not overrule Judge Young's findings that the discharges violated the applicable water quality standard and were deleterious to the stream. (App. 52)

The court vacated the judgment of the district court and remanded the case for entry of judgment in favor of Carroll County. Carroll County continues to add heat to the Piney Run in amounts that violate the water quality standard and without a permit which lists that pollutant.

REASONS FOR GRANTING THE PETITION

I. Does the "permit shield" provision in the Clean Water Act allow a permit holder to discharge pollutants not listed on its National Pollutant Discharge Elimination System permit?

This case squarely presents the question of whether, under the Clean Water Act, a discharger is entitled to add a pollutant to the Nation's waters from a point source without first procuring a National Pollutant Discharge Elimination System permit which lists the amount and quantity in which that pollutant may be discharged.

The Fourth Circuit, reversing the judgment of the district court, found that the discharger had "adequately disclosed," and the regulatory agency had "reasonably contemplated," the discharge of heat. The court then held that such disclosure and contemplation triggered the application of the "permit shield" to subsequent discharges of heat in quantities violating the water quality standard. The consequence of this first-impression case on the elements of the permit shield provision is that dischargers may now claim that they may discharge with impunity any pollutant which they have merely identified by name to the permitting agency, as long as the permit does *not* list that pollutant. The ruling below fundamentally alters the structure of the Clean Water Act and contradicts the intention of Congress that there is no *extra*-permit right to discharge pollutants into the Nation's waters.

Petitioner respectfully asserts that this case merits review by this Court for five reasons: first, it poses a conflict with cases in circuits which have held

that a discharger's right to add a pollutant to the Nation's waters derives solely from the issuance of an NPDES permit. Second, it conflicts with this Court's explanation of the role of NPDES permits in the Clean Water Act and of the importance of the finality of such permits, as written. Third, it conflicts with Congress' intent that the public be informed of the pollutants which a discharger proposes to discharge into their waters, so that the public has a meaningful opportunity to challenge discharges which they believe will degrade the waters. Fourth, it conflicts with the EPA's internal understanding of § 1342(k). Fifth, it conflicts with Congress' intent that the enforcement of the Act be straightforward. The ability of citizens and the EPA to enforce the Clean Water Act quickly and efficiently was one of the main purposes of the enactment of the NPDES system. The unsettled state of the law and the Fourth Circuit's view that polluters may now litigate what the permitting authority could have "reasonably contemplated," pose important federal questions bearing on the enforceability of the Act.

1. *The Fourth Circuit's ruling conflicts with opinions of other Circuit Courts of Appeals*

The Fourth Circuit's ruling conflicts with opinions of the Circuit Courts of Appeals for the District of Columbia, Third and Fifth Circuits. Each has ruled that no one may discharge any pollutant without an NPDES permit to do so.

In *National Resource Defense Counsel v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977), the District of Columbia Circuit Court wrote that "the legislative

history makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of [§] 301(a)." That court quoted the legislative history that "Even when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement." (quoting 118 Cong. Rec. 10215 (1972)). That court held, therefore, that the Act prohibits the Environmental Protection Agency from excluding "minor" polluters from the NPDES program. The Fourth Circuit, however, determined below that a pollutant is exempt from the NPDES requirement if "adequately disclosed" to, and "reasonably contemplated" by, the permitting agency. The Fourth Circuit's ruling that MDE could validly pre-screen a pollutant from the NPDES requirement directly conflicts with *Costle*.

Similarly, in *United States v. Frezzo Bros. Inc.*, 602 F.2d 1123, 1128 (3rd Cir. 1979), *cert.* denied 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980), the Third Circuit held that absence of the promulgated effluent limitations for a certain pollutant does not "nullify the flat prohibition on discharges under § 1311(a)." Thus, in the Third Circuit, the fact that permissible limits of the pollutant remain undetermined does not mean that the defendant can discharge it without a permit. In *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 559 (5th Cir. 1996), the Fifth Circuit held that "the discharge of any pollutant without a NPDES permit is an unlawful act under § 1311(a)."

These circuits applied the legal principle that a discharger may only add those pollutants allowed in the four corners of their permits. The law as stated by *Costle*, that an agency "has the discretion either to issue

a permit or to leave the discharger subject to the total prescription of [§ 1311]," 568 F.2d 1375, leaves no room for the exceptions carved out below for discharges "contemplated" by an agency.

The Fourth Circuit has not followed the District of Columbia, Third and Fifth Circuits. Instead, it has joined the Second Circuit, which has ruled that "the discharge of unlisted pollutants is not unlawful under the CWA." *Atlantic States Legal Foundation v. Kodak,* 12 F.3d 353, 354 (2nd Cir. 1993), *cert.* denied 513 U.S. 811, 115 S.Ct. 62, 130 L.Ed.2d 19 (1994). There, prior disclosures had been made in writing and there was no evidence that the discharges violated the state's water quality standards.

2. *The Circuit Court's ruling decided an important question of federal law that conflicts with relevant decisions in which this Court explained the Act*

The Fourth Circuit's interpretation of the permit shield provision conflicts with the Supreme Court's explanation of the Clean Water Act. In applying the Act in other contexts, this Court has explained that the Act prohibits the discharge of pollutants into navigable waters without a permit to do so. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc Chesapeake Bay Foundation,* 484 U.S. 49, 52, 108 S.Ct. 376, 379, 98 L.Ed.2d 306, (1987), *City of Milwaukee v. Illinois,* 451 U.S. 304, 310-11, 101 S.Ct. 1784, 1789, 68 L.Ed.2d 114 (1981). The Fourth Circuit held the converse: that a permitholder may discharge any amount of any pollutant not listed on the permit if this state agency "reasonably contemplated" some level of discharge of that pollutant.

Neither this Court nor any other Circuit Court has previously applied the "permit shield" to allow the discharge of an unlisted pollutant on the basis of adequate disclosure and reasonable contemplation. This Court has only observed: "The purpose of [§] 402(k) seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, [§] 402(k) serves the purpose of giving permits finality." *E.I. du Pont de Nemours & Co. Train*, 430 U.S. 112, 138 n.28, 97 S.Ct. 965, 980 n.28, 51 L.Ed.2d 204 (1977). The Fourth Circuit's ruling that a federal court may both consider subsequent oral testimony of what a state agency could have "reasonably contemplated," and imply an entirely different pollutant into a permit conflicts with the purpose of giving permits finality.

3. *The Circuit Court's ruling decided an important question of federal law that has not been, but should be, decided by this Court*

The ruling below presents an important federal question on three grounds. First, the Fourth Circuit's ruling conflicts with Congress' intent that the public be informed of the pollutants which a discharger proposes to discharge into their waters, so that the public has a meaningful opportunity to challenge discharges which they believe will degrade the waters. The Declaration of Policy in the Act's legislative history states that "[a] high degree of informed public participation in the control process is essential to the accomplishment of the objectives we seek-- a restored and protected

natural environment." 1972 U.S.C.C.A.N. 3679. Congress explained further that "[t]he public must have a genuine opportunity to speak on the issue of protection of its waters." *Id.* at 3738. The Fourth Circuit's ruling that a permit which does not list a pollutant may be later interpreted to allow unlimited and deleterious discharges of that pollutant nullifies the public notice and challenge provisions of the Act. As held by the state court in *Woodward,* citizens cannot be expected to participate meaningfully in a permit challenge when the agency has not publicly articulated its findings concerning compliance with water quality standards. The Fourth Circuit's ruling that the "permit shield" can authorize the discharge of unlisted pollutants raises an important federal question concerning citizens' ability to participate in the permitting process.

Second, the ruling below conflicts with the EPA's understanding of the permit shield. The EPA has interpreted § 1342(k) in two internal memoranda. The final memorandum requires, as an element of the defense, proof that the permit holder provided *written* disclosure of the pollutant during the permit application process. The EPA "[clarified] that a discharge must provide the information in writing for the permit record in order to obtain the authorization to discharge and the shield provided by a (NPDES) permit." (App. 140) According to the EPA, the pollutants must be "identified *in writing* as present ... during the permit application process *and contained in the administrative record which is available to the public.*" (App. 142) Here, the record contains no written disclosure by the County prior to the issuance of the permit, no testimony of any witness who was

employed by the County or MDE during the permit application process, and no reference to any knowledge by MDE that the thermal pollution would violate the water quality standard. The ruling below presents an important federal question as to the elements of the permit shield defense.

Third, the ruling below calls into question the functioning of the NPDES scheme as an effective enforcement tool. The legislative history of the Clean Water Act makes clear that the finality of permits was intended to ensure efficient enforcement proceedings. Congress intended that the Act would "avoid the necessity of lengthy fact finding, investigations and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." 1972 U.S.C.C.A.N. 3730. The Fourth Circuit's *de novo* consideration of oral testimony about the recollections of agency staff leaves the law unsettled as to when a permit may be supplemented by reference to an understanding between a state agency and a discharger that was never included in the permit.

Petitioner respectfully requests that this Court grant *certiorari* to resolve the inter-circuit conflict, to address the conflict between the Fourth Circuit's ruling and the settled principles of the Act as set forth by the Court and to address these important federal questions.

II. May a federal court construe the "permit shield" provision in the Clean Water Act to license a permitholder to discharge a pollutant in quantities that violate the applicable state water quality standards, when that pollutant is not listed on its NPDES permit?

The Fourth Circuit acknowledged that the undisputed evidence proved that the County's discharges of heat violated the applicable water quality standard. (App. 9) The court then ruled as a matter of law that the "permit shield" made those discharges legal. This Court should grant *certiorari* to determine whether the "permit shield" doctrine may be construed so as to permit the discharge of pollutants in violation of the applicable state water quality standards.

1. The Fourth Circuit's ruling conflicts with opinions of other Circuit Courts of Appeals

The Fourth Circuit's ruling conflicts with the rule in the Ninth and Eleventh Circuits. In *Northwest Environmental Associates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995), *cert.* denied 518 U.S. 1018, 116 S.Ct. 2550, 135 L.Ed.2d 1069 (1996), the Ninth Circuit relied on *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) to hold that citizens may sue for violations of water quality standards that have not been reduced to end-of-pipe effluent limitations. This Court denied *certiorari* in *Northwest Environmental Associates* prior to the Fourth Circuit's ruling in *Piney Run*. At that time, there was no conflict between the Circuits on the question of whether citizens had standing to sue a discharger under the Clean Water Act for violations of

water quality standards. The only published opinion from the Eleventh Circuit acknowledged *Atlantic States Legal Foundation v. Kodak,* but followed the Ninth Circuit rule in *Northwest Environmental Associates. Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta,* 953 F.Supp. 1541 (N.D.Ga. 1996).

2. *The Circuit Court's ruling decided an important question of federal law that conflicts with relevant decisions of this Court*

The ruling below also conflicts with this Court's explanation of the Act. In *Environmental Protection Agency v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 224, 96 S. Ct. 2022, 2033, 48 L. Ed. 2d 578 (1976). There, the Court stated that citizens may sue permit holders under 33 U.S.C. § 1365(f)(6) if they can prove a violation of "conditions imposed in accordance with EPA-promulgated effluent limitations and standards and for those imposed in accordance with more stringent standards and limitations established by a State pursuant to § 510 [of the Clean Water Act, 33 U.S.C. § 1370]." (emphasis added) Carroll County's permit expressly required it to comply with state law.

More recently, the Court in *Arkansas, et al. v. Oklahoma, et al,* 503 U.S. 91, 101, 112 S. Ct. 1046, 117 L.Ed. 2d 239, 251 (1992), reviewed the relationship between water quality standards and end-of-pipe effluent limitations:

The Clean Water Act anticipates a partnership between States and the federal Government, animated by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Toward this end, the Act provides for two sets of water quality measurements. "Effluent limitations" are promulgated by the EPA and restrict the quantities, rates and concentrations of specified substances which are discharged from point sources. See §§ 1311, 1314. "[W]ater quality standards" are, in general, promulgated by the States and establish the desired condition of a waterway. See § 1313. These standards supplement effluent limitations "so that the numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 205, n 12, 48 L.Ed. 2d 578, 96 S. Ct. 2022 (1976).

***

The primary means for enforcing these limitations and standards is the NPDES, enacted in 1972 as a critical part of Congress' "complete rewriting" of federal water pollution law.

Thus, a discharger violates the Act if its discharge contains a pollutant in quantities that violate either the applicable state water quality standard or the numerical effluent limitation in the permit. Here, MDE issued Carroll County's permit pursuant to Title 9 of Maryland's Environmental Article. Section 9-324 requires all discharges to comply with water quality standards. (App. 106) Similarly, 40 CFR § 122.4 provides that "No [NPDES] permit may be issued: (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." (App. 105)

The Fourth Circuit's ruling conflicts with this authority by establishing the rule that dischargers are not required to comply with water quality standards so long as the permit contains no numerical effluent limitation for that pollutant and the agency "reasonably contemplated" the discharge of the pollutant. The ruling below also effectively excludes the public from knowing the components of a permitholder's discharge, until, as here, the violation of the water quality standards has occurred.

The question presented in this case can be expected to recur frequently in the future. Until now, district courts addressing Clean Water Act cases have found them well-suited to summary judgment because the only discharges allowed were those listed on the permit. The ruling below, however, opens the door to a defense, nowhere stated in the Act, that discharges of unlisted pollutants are legal whenever an agency "reasonably contemplated" it. Citizens whose state agencies refused to diligently prosecute violators will

now be required to litigate the state of mind of agency staff. Congress did not so intend, and the words of § 1342(k) do not so provide.

Petitioner respectfully requests that this Court grant *certiorari* to resolve the inter-circuit conflict and the conflict between the Fourth Circuit's ruling and the rulings of this Court.

III. Does a federal court have the power to make legal the discharge of a pollutant not listed on a NPDES permit in quantities which the state permitting agency could not have permitted under its governing state law?

The Fourth Circuit's ruling that the permit shield licensed Carroll County to add heat over 20°C (68°F) and the ambient temperature rewards those dischargers which "adequately disclose" pollutants by name only, rather than by quantity. Had Carroll County "adequately disclosed" the temperatures of its effluent, MDE could not have permitted them because those temperatures violated the water quality standard. In the absence of such specificity, the Fourth Circuit has licensed them.

The ruling below also conflicts with a prior Maryland state appellate court decision to vacate MDE's decision to modify the County's 1990 permit. *Woodward, et al. v. The Maryland Department of Environment*, Maryland Court of Special Appeals, No. 1660 (September Term 1997). The *Woodward* court held that (1) state law prohibited the MDE from issuing a permit without considering the thermal water quality standard and (2) there was nothing in MDE's files as late as 1993 concerning the temperature of the County's

discharge. (App. 90-91) In 1998, the *Woodward* court vacated MDE's decision to issue the modified permit because "there was no evidence in the record that: (1) the MDE ... (a) applied the agency's thermal criterion [water quality standard], and (b) found that the temperature limit would be met with the proposed discharge." (App. 90-1) The state court concluded "that MDE never determined, at any point during the entire permit-issuing process, the underlying facts necessary for a proper application of the stream's temperature regulation." (App. 66, n.1) (emphasis by the court) *Woodward* was in evidence before the district court. (App. 56-57) By deeming the 1990 permit to include heat discharges, the Fourth Circuit gave MDE powers which the *Woodward* court had found that agency lacked.

Whether a federal court may determine after the issuance of a permit that NPDES permits "shield" discharges of unlisted pollutants in quantities which violate state law raises the important federal question of whether a polluter may invoke the federal permit shield to defeat the state's more stringent requirement that no permit may be issued without an articulated finding that the discharge will not violate the water quality standards. EN § 9-324; *Woodward*. The Clean Water Act expressly preserves the power of States to impose more stringent requirements than those in the Act. 33 U.S.C. § 1370. The Fourth Circuit deemed MDE to have issued a permit which that agency lacked the power to issue. Whether a federal appeals court may read into a permit provisions which are illegal under state law, and then enforce that permit, and whether it may expand a state agency's permitting powers, are questions this Court has never addressed.

Petitioner respectfully requests that this Court grant *certiorari* to address these important federal questions.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1283

THE PINEY RUN PRESERVATION ASSOCIATION,
Plaintiff-Appellee,

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,
Defendant-Appellant.

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES; WATER ENVIRONMENT FEDERATION; MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INCORPORATED; VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INCORPORATED; WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION, INCORPORATED; AMERICAN CHEMISTRY COUNCIL; AMERICAN FOREST AND PAPER ASSOCIATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; GENERAL ELECTRIC COMPANY; NATIONAL ASSOCIATION OF MANUFACTURERS; UTILITY WATER ACT GROUP; VIRGINIA MANUFACTURERS ASSOCIATION; M.A.D.E.IN MARYLAND; ALLIANCE OF AUTOMOBILE MANUFACTURERS;

AMERICAN IRON AND STEEL INSTITUTE;
AMERICAN PETROLEUM INSTITUTE;
ENVIRONMENTAL FEDERATION OF OKLAHOMA;
MICHIGAN MANUFACTURERS ASSOCIATIONS;
MISSISSIPPI MANUFACTURERS ASSOCIATION;
NATIONAL PETROCHEMICAL AND REFINERS
ASSOCIATION; NUCLEAR ENERGY INSTITUTE;
WESTERN STATES PETROLEUM ASSOCIATION,
Amici Curiae.

No. 00-1322

THE PINEY RUN PRESERVATION ASSOCIATION,
Plaintiff-Appellant,

v.

COUNTY COMMISSIONERS OF CARROLL
COUNTY, MARYLAND,
Defendant-Appellee.

ASSOCIATION OF METROPOLITAN SEWERAGE
AGENCIES; WATER ENVIRONMENT FEDERATION;
MARYLAND ASSOCIATION OF MUNICIPAL
WASTEWATER AGENCIES, INCORPORATED;
VIRGINIA ASSOCIATION OF MUNICIPAL
WASTEWATER AGENCIES, INCORPORATED;
WEST VIRGINIA MUNICIPAL WATER QUALITY
ASSOCIATION, INCORPORATED; AMERICAN
CHEMISTRY COUNCIL; AMERICAN FOREST
AND PAPER ASSOCIATION; CHAMBER OF
COMMERCE OF THE UNITED STATES OF
AMERICA; GENERAL ELECTRIC COMPANY;

NATIONAL ASSOCIATION OF MANUFACTURERS; UTILITY WATER ACT GROUP; VIRGINIA MANUFACTURERS ASSOCIATION; M.A.D.E.IN MARYLAND; ALLIANCE OF AUTOMOBILE MANUFACTURERS; AMERICAN IRON AND STEEL INSTITUTE; AMERICAN PETROLEUM INSTITUTE; ENVIRONMENTAL FEDERATION OF OKLAHOMA; MICHIGAN MANUFACTURERS ASSOCIATIONS; MISSISSIPPI MANUFACTURERS ASSOCIATION; NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION; NUCLEAR ENERGY INSTITUTE; WESTERN STATES PETROLEUM ASSOCIATION,

Amici Curiae.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, Senior District Judge. (CA-98-3124-Y)

Argued: April 5, 2001
Decided: October 10, 2001
[Entered: October 10, 2001]

Before WILKINS, KING, and GREGORY, Circuit Judges.

Vacated and remanded by published opinion. Judge King wrote the opinion, in which Judge Wilkins and Judge Gregory joined.

COUNSEL

ARGUED: Linda S. Woolf, GOODELL, DEVRIES, LEECH & GRAY, L.L.P., Baltimore, Maryland, for Appellant. Christopher Donald Pomeroy, MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Amici Curiae State Associations. Guerdon Macy Nelson, Towson, Maryland, for Appellee.

ON BRIEF: Michael B. MacWilliams, Ian Gallacher, GOODELL, DEVRIES, LEECH & GRAY, L.L.P., Baltimore, Maryland, for Appellant. F. Paul Calamita, MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Amici Curiae State Associations. D. Randall Benn, Paul C. Freeman, LEBOEUF, LAMB, GREENE & MACRAE, L.L.P., Washington, D.C., for Amici Curiae Sewerage Agencies, et al. James N. Christman, HUNTON & WILLIAMS, Richmond, Virginia, for Amici Curiae Industry Groups. Robert G. Smith, Anthony M. Carey, VENABLE, BAETJER & HOWARD, L.L.P., Baltimore, Maryland, for Amicus Curiae M.A.D.E. in Maryland. Scott M. DuBoff, Kenneth S. Kaufman, WRIGHT & TALISMAN, P.C., Washington, D.C., for Amici Curiae Automobile Manufacturers, et al.

OPINION

KING, Circuit Judge:

The Piney Run Preservation Association sued the Commissioners of Carroll County, Maryland, claiming that a county-operated waste treatment plant was discharging warm water into a local stream, Piney Run, in violation of the Clean Water Act. The district court construed the plant's NPDES permit as not prohibiting the discharge of heat. Nonetheless, the court decided that the Commissioners were liable under the Clean Water Act for the discharge of pollutants not expressly authorized by the permit. On appeal, the Commissioners maintain that the "permit shield" defense, embodied in 33 U.S.C. § 1342(k), bars suit against a permit holder for the discharge of pollutants not expressly listed in the permit. Although we do not accept the Commissioners' position on the permit shield defense, we also disagree with the district court's interpretation of the Clean Water Act. Utilizing the two-part test spelled out in Chevron, U.S.A., Inc. v. Natural Resources Defense Council,[1] 467 U.S. 837 (1984), we adhere to the interpretation provided by the EPA. We therefore view the NPDES permit as shielding its holder from liability under the Clean Water Act as long as (1) the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements and (2)

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[1] The Chevron doctrine provides that interpretations of governing statutes by authorized administrative agencies receive deference from the courts if (1) the statutory language is ambiguous and (2) the administrative interpretation is reasonable. 467 U.S. at 844.

the permit holder does not make a discharge of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted. Applying this rule, we conclude that the Commissioners did not violate the Clean Water Act because (1) they complied with the discharge limitations and reporting requirements of their permit, and (2) their discharges of heat were within the reasonable contemplation of the permitting authority at the time the permit was issued. Accordingly, we vacate the judgment of the district court, and we remand for entry of judgment in favor of the Commissioners.

I.

Piney Run is a small stream with its headwaters near the border of Carroll and Baltimore counties in Maryland. The Maryland Department of the Environment ("MDE") has classified Piney Run as a Class III-P stream, which means that it is protected as a source of public drinking water and as a body capable of supporting a self-sustaining trout population. See Md. Regs. Code ("COMAR") tit. 26, § 26.08.02.02(B)(5). Carroll County operates the Hampstead Wastewater Treatment Plant ("Plant"), which serves approximately 4200 residential and commercial users. As part of the treatment process, the Plant discharges effluent, i.e., treated wastewater, into Piney Run.

Because of the Plant's discharge of effluent into Piney Run, the Plant is subject to the Clean Water Act ("CWA "). See 33 U.S.C. § 1311(a). Under the CWA, dischargers must operate pursuant to a National Pollutant Discharge Elimination System ("NPDES")

permit obtained from either the Environmental Protection Agency ("EPA") or an authorized state agency. See id. §§ 1311(a), 1342(a), (c); see also Md. Code Ann. Envir. § 9-323. Beginning in 1975, the Plant has operated under a series of NPDES permits granted by the MDE as the authorized state agency. The most recent NPDES permit was issued to the Plant in 1990.

Under the CWA, the various states are required to promulgate water quality standards for certain waters within their borders. See 33 U.S.C. § 1313. Such standards denote designated uses of particular bodies of water and establish water quality criteria designed to protect those uses. See 40 C.F.R. §§ 131.10(a), 131.11. In order to grant a permit or a permit modification, the MDE must determine that the discharger will not violate these water quality standards. See Md. Code Ann. Envir. § 9-324(a); COMAR tit. 26, § 26.08.04.02(A)(1)(b).

The Piney Run Preservation Association ("Association"), which is dedicated to the protection of Piney Run, filed this lawsuit in the District of Maryland in 1998. The Association sued the Commissioners under section 505 of the CWA, 33 U.S.C. § 1365(a),[2] claiming that the Plant's NPDES permit limited the amount of heated effluent it could discharge into Piney

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[2] Section 505 provides, in pertinent part, that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a). This provision of the CWA allows citizens "to bring suit against any NPDES permit holder who has allegedly violated its permit" and "a successful suit may result in the award of injunctive relief and the imposition of civil penalties payable to the United States Treasury." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152 (4th Cir. 2000).

Run, and that the Plant regularly exceeded this limit.[3] The Plant's 1990 permit contained express limitations on the amount of certain pollutants that may be discharged. Heat, a statutory pollutant under the CWA, was not listed in the 1990 permit as one of these pollutants.[4] See id. § 1362(6). In its lawsuit, the Association claimed that a footnote of the Plant's NPDES permit flatly prohibited the discharge of any

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[3] In 1991, the Plant petitioned MDE for modification of its 1990 permit to allow it to increase its daily discharge of effluent. The MDE proposed granting the modification, but several neighboring landowners challenged the change and contended that the MDE had not sufficiently analyzed whether the Plant would comply with state water quality temperature standards in discharging the increased effluent. Although the MDE adjudicatory bodies and the Circuit Court for Baltimore County dismissed the landowners' claim, the Court of Special Appeals of Maryland upheld the landowners' challenge and remanded the case to the MDE to measure the ambient temperature of Piney Run and to ascertain whether the Plant violated Maryland water quality standards at its current or proposed levels of discharge. Therefore, because the Plant has not received final approval for a modified permit, the 1990 permit is the relevant permit for this case.

[4] Although the Association asserts that the Plant discharged heat in violation of the NPDES permit, the crux of the Association's challenge is that the Plant discharged water into Piney Run that was warmer than the baseline temperature, or "ambient temperature," of the stream. In essence, the Association contends that heat was discharged into Piney Run in violation of the CWA any time the temperature of the water discharged exceeded that of Piney Run, even if the difference in temperature between the two was slight. For example, the Association claims that the Commissioners violated the CWA even though the Plant's effluent was less than ten degrees Fahrenheit warmer than the temperature of Piney Run, and the discharged water was never measured as exceeding approximately 75.2 degrees Fahrenheit.

pollutants that were not expressly listed in the permit. In the alternative, the Association argued that a permit holder may be liable under the CWA for the discharge of any pollutant not expressly allowed by its permit. The Association claimed that under either of these theories, the Plant was in violation of the CWA if it discharged any level of heat whatsoever. In May 1999, the district court construed the Commissioners' permit as allowing for the discharge of heat, but held that the CWA prohibits the discharge of any pollutant that is not limited by the permit. Using Maryland water quality standards, the court concluded that heat constituted a pollutant in violation of the CWA when effluent was discharged "with a temperature exceeding the greater of either 68 degrees [Fahrenheit] or the ambient temperature of Piney Run." Piney Run Pres. Ass'n. v. County Comm'rs., 82 F. Supp. 2d 464, 466 (D. Md. 2000) (citing COMAR tit. 26, § 26.08.02.03-3E). The court then calculated the "ambient temperature" of the stream, and found on partial summary judgment that the Commissioners had violated the CWA on 183 occasions.[5] In January 2000, the court conducted a

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[5] The Commissioners subsequently moved for reconsideration by the district court of its summary judgment ruling or, in the alternative, for certification of an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). In order to grant certification under § 1292(b), a district court must find that the order at issue "involves a controlling question of law as to which there is substantial ground for difference of opinion." The district court denied the Commissioners' motion to reconsider, but properly certified its summary judgment ruling for interlocutory appeal. On August 30, 1999, however, we denied the Commissioners' petition for interlocutory review. The Commissioners then filed a second motion for reconsideration in the district court, which was also denied.

bench trial in connection with the discharges in dispute, and it found an additional 107 CWA violations against the Commissioners. Accordingly, the court in February 2000 entered judgment for the Association, enjoined the Commissioners from further violations, assessed them $400,000 in civil penalties payable to the United States Treasury, and awarded the Association its litigation costs and reasonable attorneys' fees.

Both the Association and the Commissioners appeal from the district court's final order of February 10, 2000. The Association claims that the district court erred in holding that the Plant only violated the CWA when its discharge of heat exceeded state temperature standards. It contends that the Plant violated the CWA henever it discharged any level of heat whatsoever. Accordingly, the Association seeks remand of this case on the issue of damages. The Commissioners, on the other hand, claim that the permit shield defense in 33 U.S.C. § 1342(k) bars holding a permit holder liable for the discharge of pollutants not expressly regulated by the permit. [6] The Commissioners also challenge the Article III standing of the Association to sue, and they assert that the doctrine of primary jurisdiction

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[6] The permit shield defense is derived from the provisions of 33 U.S.C. § 1342(k), which provides:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.

precludes the district court's findings with respect to the ambient temperature of Piney Run. [7]We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

The Commissioners claim that the Association lacks Article III standing. Pursuant to Article III of the Constitution, federal courts are restricted to the adjudication of "cases" and "controversies." The standing requirement therefore "ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 153 (4th Cir. 2000). Moreover, the standing inquiry also "tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Valley Forge Christian College v.

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[7] The doctrine of primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a `referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." Reiter v. Cooper, 507 U.S. 258, 268 (1993). The doctrine has been deemed to apply in circumstances in which federal litigation raises a difficult, technical question that falls within the expertise of a particular agency. See, e.g., American Auto. Mfrs. Ass'n. v. Mass. Dept. of Envt'l. Prot., 163 F.3d 74, 81 (1st Cir. 1998). In this case, the Commissioners contend that the district court should have deferred to the MDE to calculate the ambient temperature of Piney Run. Although the Commissioners' point may be compelling, we need not reach this issue because the ambient temperature of Piney Run has no bearing on our disposition of this appeal.

Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). In analyzing a decision on Article III standing, we review the district court's factual findings for clear error. We consider the legal question of whether the Association possesses standing to sue as a de novo matter. See Marshall v. Meadows, 105 F.3d 904, 905-06 (4th Cir. 1997).

An association, as the representative of its members who have been harmed, possesses standing to sue if it can show: (1) at least one member would otherwise have individual standing, (2) the interests at stake in the litigation are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. See Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000); Warth v. Seldin, 422 U.S. 490, 511 (1975). On appeal, the Commissioners only contest the first prong of this three-part test, i.e., whether any member of the Association has individual standing to sue. An individual possesses Article III standing if (1) he or she has suffered an "injury in fact," (2) that is fairly traceable to the challenged action of the defendant, and (3) it is likely that the injury will be redressed by a favorable decision. See Laidlaw, 528 U.S. at 180-81. In this proceeding, the Commissioners challenge the first two elements of the individual standing test: they assert that no member of the Association has suffered an "injury in fact," and that even if an Association member has suffered such an injury, it is not "fairly trace-able" to the Plant's operation. They correctly point out that the elements of standing are "not mere

pleading requirements," but rather must be supported by sufficient evidence. Lujan v. Defenders of Wild-life, 504 U.S. 555, 561 (1992).

A plaintiff can show an "injury in fact" when he or she suffers "an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent." Gaston Copper, 204 F.3d at 154; see also Defenders of Wildlife, 504 U.S. at 560. In an environmental case, the question is whether the plaintiff has suffered an injury, as opposed to whether the environment has actually been harmed. See Laidlaw, 528 U.S. at 181. Specifically, a plaintiff need only show that he used the affected area, and that he is an individual "for whom the aesthetic and recreational values of the area [are] lessened" by the defendant's activity. Sierra Club v. Morton, 405 U.S. 727, 735 (1972); see also Laidlaw, 528 U.S. at 184 (holding that plaintiffs had established an injury in fact because the challenged activity directly affected their "recreational, aesthetic, and economic interests"); Defenders of Wildlife, 504 U.S. at 562-63 ("[T]he desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing."); Gaston Copper, 204 F.3d at 159 (concluding that individuals' allegations that they would make greater recreational use of waterway except for concern over defendant's discharges sufficient for injury in fact).

In this case, Dorothy Rowland, a member of the Association, is able to show that she has suffered an injury in fact. Piney Run flows through Rowland's property. She testified that when she purchased her property in 1967, Piney Run was "very pristine," but that in the last several years the stream had acquired a

high concentration of green algae. Rowland stated that the green algae significantly interfered with her use and enjoyment of Piney Run. For example, the algae made the stream's rocks slippery, and therefore difficult to cross. Because the water is no longer clear, she stopped allowing her horses to drink from Piney Run. Further, according to Rowland, the green algae made the stream less desirable to observe. In sum, Rowland demonstrated that her enjoyment of Piney Run has been diminished, and accordingly, she has sufficiently shown an "injury in fact."

Rowland can also show that her injury was "fairly traceable" to the Plant's operation. The plaintiff's injury must be fairly traceable to the challenged action of the defendant and not the result of some independent action. See, e.g., Defenders of Wildlife, 504 U.S. at 561. The Commissioners maintain that the Association failed to provide sufficient scientific evidence that the concentration of green algae in Piney Run was caused by the Plant's discharge of heat. According to the Commissioners, the Association had to show that, but for the Plant's operation, the algae would not have developed in the stream. The Commissioners, however, misapprehend what the Association must demonstrate to show traceability. Traceability "does not mean that plaintiffs must show to a scientific certainty that defendant's effluent . . . caused the precise harm suffered by the plaintiffs." Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992) (internal quotation marks omitted); see also Gaston Copper, 204 F.3d at 161 (same). Rather, a plaintiff "must merely show that a defendant discharges a pollutant that causes or

contributes to the kinds of injuries alleged." Watkins, 954 F.2d at 980 (internal quotation marks omitted); see also Gaston Copper, 204 F.3d at 161 (same).

In this case, the Association presented evidence that the Plant is discharging heat into Piney Run. Dr. Stauffer, a professor of ichthyology (the study of fish), testified that heat can cause green algae to proliferate.[8] Rowland therefore has sufficiently shown that her alleged injury is "fairly traceable" to the challenged actions of the Plant. Rowland has demonstrated that she would possess individual standing if she were to sue the Commissioners for unlawfully operating the Plant. Because Rowland would have individual standing the Association has standing to sue as a representative of its members.

III.

We turn now to the district court's interpretation and application of the CWA. The court found that the Plant's NPDES permit contained no prohibition on discharging heat, but concluded that the Plant was liable under the CWA because the discharge of heat was not expressly allowed by the permit. We are, however, constrained to disagree. In these circumstances, because the Commissioners adequately disclosed that the Plant was discharging heat and

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[8] The Commissioners contend that the district court abused its discretion in allowing Dr. Stauffer to opine that the Plant's discharge of heat was affecting Piney Run's trout population. Specifically, the Commissioners claim that Dr. Stauffer's testimony did not meet the standards for admissibility. Regardless, because of the broad discretion accorded trial courts in such matters, and due to Dr. Stauffer's qualifications and the nature of his testimony, it was not erroneous for the district court to consider his evidence.

because their discharges were within the reasonable contemplation of the MDE during the permit application process, the NPDES permit allowed the Plant to discharge heat. To explain our view on this point, a brief overview of the history and structure of the CWA is required.

A.

Prior to enactment of the CWA in 1972, the Water Pollution Control Act of 1948, as amended by the Water Quality Act of 1965, was the primary means of federal regulation of water pollution. See generally EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 202 (1976); Martin A. McCrory, Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication, 20 Stan. Envtl. L.J. 73, 79-81 (2001).

Under this regulatory scheme, states were required to promulgate water quality standards for certain bodies of water within their borders. See Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 151 (4th Cir. 2000). Operators could discharge pollutants so long as their discharges did not reduce water quality below these standards. This water quality standard scheme, however, was plagued with many problems. Significantly, it was often difficult to formulate precise water quality standards and even more difficult to prove that a particular operator's discharge reduced water quality below these standards. See S. Rep. No. 92-414 (1971); see also Gaston Copper, 204 F.3d at 151.

The CWA (and its later amendments) represented a fundamental change in the manner of federal regulation of water pollution. The CWA "shifted the focus away from water quality standards to direct limitations on the discharge of pollutants." Gaston Copper, 204 F.3d at 151 (citing 33 U.S.C. § 1311). Regulators no longer had to determine whether there was a causal link between the degradation of water quality and the pollutant in question; they simply had to determine whether the entity was discharging more pollutant into water than allowed by the CWA. Id. The CWA also established a default regime of strict liability. Unless a discharge fit within one of the CWA's limited exceptions, the entity discharging the pollutant violated the CWA, regardless of the quantity of pollutant emitted. Id. Thus, the "centerpiece of the Clean Water Act," § 301(a), provides that "[e]xcept as in compliance with this section and [other sections of the Act], the discharge of any pollutant by any person shall be unlawful." Gaston Copper, 204 F.3d at 151 (quoting 33 U.S.C. § 1311(a)).

The primary exception to the blanket liability imposed by the CWA is the NPDES permitting system. See Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977) ("[T]he legislative history makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of [§] 301(a)."). Although Congress intended the CWA to lead to the long-term elimination of pollutants in the nation's waterways, Congress recognized the technological infeasibility of prohibiting all pollutants in the short term. See id. at 1373. Therefore, under § 402 of the CWA, individuals may apply for NPDES permits

to discharge a limited amount of effluent. See 33 U.S.C. § 1311(a), 1342(a) & (c). The EPA issues NPDES permits; however, the EPA suspends its issuance of permits if it approves a state permitting program. See id. § 1342(c)(1). The EPA has authorized approximately forty states, including Maryland, to issue NPDES permits. See 57 Fed. Reg. 43,733, 43, 734-35 (1992) (listing states with permitting authority). Permit holders, no matter the issuing authority, are required to comply "not only with the limitations on the amount of pollutants they may discharge, but also with a variety of monitoring, testing, and reporting requirements." Gaston Copper, 204 F.3d at 151. Assuming that they follow the terms of their NPDES permits, however, permit holders avoid CWA liability.

In crafting a permit, the permitting authority (either the EPA or the designated state authority, in this case, the MDE), must take account of two central concepts. The CWA requires that "every permit contain (1) effluent limitations that reflect the pollution reduction achievable by using technologically practicable controls and (2) any more stringent pollutant release limitations necessary for the waterway receiving the pollutant to meet `water quality standards.'" American Paper Inst., Inc. v. United States Envt'l. Prot. Agency, 996 F.2d 346, 349 (D.C. Cir. 1993) (citing 33 U.S.C. § 1311(b)(1)) (internal citations omitted). Thus, despite the CWA's shift in focus of environmental regulation towards the discharge of pollutants, water quality standards still have an important role in the CWA regulatory

scheme.[9] Before issuing a permit the permitting authority must, with reference to what is technologically feasible, incorporate "discharge limitations necessary to satisfy [the state water quality] standard." Id. at 350 (citing § 301 of the CWA).

The effectiveness of the permitting process is heavily dependent on permit holder compliance with the CWA's monitoring and reporting requirements. See 33 U.S.C. § 1318. The permitting authority receives discharge information from all relevant parties and then calibrates each individual permit to maintain overall state water quality standards. NPDES permits are therefore somewhat interdependent; the permitting authority must account for the effluent discharge of others in calculating the appropriate levels for an individual permit holder.

B.

Having briefly reviewed the history and structure of the CWA, we now turn to the central question on appeal, the nature of the Commissioners' liability, if any, under the CWA. The district court concluded that the CWA prohibits the discharge of any pollutant not expressly allowed by an operator's NPDES permit. The Commissioners challenge that ruling, contending that the permit shield defense bars

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[9] Under the CWA, states have the primary role in promulgating water quality standards. The CWA requires that states review their water quality standards at least once every three years in "a process commonly known as triennial review" to ensure that the standards "`protect the public health or welfare, enhance the quality of water and serve the purposes' of the Act." American Paper Inst., 996 F.2d at 349 (quoting 33 U.S.C. § 1313(c)(2)(A)).

suit against NPDES permit holders under the CWA except for violations of the express conditions of the permit. We view each of these interpretations as being at variance with the CWA's liability scheme; although the CWA does prohibit the discharge of pollutants not contained within the NPDES permit, the protection offered by the permit is broader than the district court suggests.

At issue is the scope of the permit shield defense. As noted previously, the NPDES permit sets out the allowable departures from the CWA's baseline of total liability for discharges of effluent. Natural Res. Def. Council, Inc. v. Costle, 568 F.2d at 1374. It is clear, therefore, that if a permit holder discharges pollutants precisely in accordance with the terms of its permit, the permit will "shield" its holder from CWA liability. The permit shield defense, however, raises two additional questions that are slightly more difficult: (1) what comprises the scope or terms of an NPDES permit, and (2) whether the permit shield bars CWA liability for discharges not expressly allowed by the permit when the holder has complied with the permit's express restrictions. It is to these matters that we now turn.

The central issue in determining the scope of a NPDES permit is whether the permit implicitly incorporates pollutant discharges disclosed by the permit holder to the permitting authority that are not explicitly allowed in the permit. Put more simply, although an operator may report multiple discharges of pollutants to the licensing body, the permit may only contain explicit limitations for some of those pollutants. The question, in that circumstance, is whether the permit holder may continue to empty the

unlisted pollutants into the water, or whether it may only discharge those pollutants that are specifically listed in the permit.

Determining the proper scope of an NPDES permit requires us to examine the language of the CWA. See Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 358 (2d Cir. 1993). In construing the application of the CWA's provisions in this case, we find it necessary and appropriate to perform a Chevron analysis. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Under Chevron, we are required to apply a two-part test. First, we examine the language of the statute to see if "Congress has directly spoken to the precise question at issue." Id. at 842. If Congressional intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 843. If the statute is ambiguous, then we apply Chevron's second step, and we defer to the agency's interpretation of its governing statute and regulations, as long as (1) the agency has promulgated that interpretation pursuant to a notice-and-comment rulemaking or a formal adjudication, Christensen v. Harris County, 529 U.S. 576, 587 (2000), and (2) the agency's interpretation is reasonable. Chevron, 467 U.S. at 843. In analyzing the reasonableness of the EPA's interpretation of the CWA, "we need not find that [the EPA's interpretation] is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very `complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." Chemical Mfrs. Ass'n. v. Natural Res. Def. Council,

Inc., 470 U.S. 116, 125 (1985) (quoting Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 75, 87 (1975)) (emphasis added).

In applying step one of Chevron, we view the crucial language of the CWA as ambiguous. The permit shield provision, 33 U.S.C.§ 1342(k), specifies that "compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title." Although this statutory language makes clear that compliance with a permit constitutes an exception to the general strict liability of the CWA, we must agree with the Second Circuit's conclusion that § 1342(k) does not explicitly explain the scope of permit protection. See Atlantic States Legal Found., 12 F.3d at 357-58 (concluding that permit shield language ambiguous with respect to scope of coverage). Therefore, because Congressional intent is not clear, we must turn to the second step of the Chevron analysis.

In applying step two of Chevron, we observe that the EPA has promulgated, pursuant to a formal adjudication, an interpretation of the permit shield provision that is reasonable. The EPA is authorized both to administer and enforce the CWA. See 33 U.S.C. § 1251(d). In a 1998 formal adjudication proceeding before the EPA's Environmental Appeals Board,[10] In re Ketchikan Pulp Co., the Board determined that the NPDES permit covers all pollutants disclosed to the permitting authority during the permit application process. 7 E.A.D. 605 (EPA 1998), 1998 WL 284964

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10 The EPA Administrator has delegated authority to review NPDES permit violations to the Environmental Appeals Board. See 40 C.F.R. §§ 1.25, 124.2.

(E.P.A.) at *12-13 ("[W]hen the permittee has made adequate disclosures during the application process regarding the nature of its discharges, unlisted pollutants may be considered to be within the scope of an NPDES permit, even though the permit does not expressly mention those pollutants."). In explaining this ruling, the Ketchikan Board observed that the EPA had already acknowledged that "it is impossible to identify and rationally limit every chemical or compound present in the discharge of pollutants" and that the EPA consequently had determined that the "goals of the CWA may be more effectively achieved by focusing on the chief pollutants and wastestreams established in effluent guidelines and disclosed by permittees in their permit applications." Id. at *11. The Board, adopting the reasoning of the Second Circuit in Atlantic States Legal Foundation, therefore held that "[t]he proper interpretation of the [CWA] regulations is that . . . [w]ater quality based limits are established where the permitting authority reasonably anticipates the discharge of pollutants by the permittee at levels that have the reasonable potential to cause or contribute to an excursion above any state water quality criterion." Id. at *11 (quoting Atlantic States Legal Found., 12 F.3d at 358).

The Ketchikan decision therefore made clear that a permit holder is in compliance with the CWA even if it discharges pollutants that are not listed in its permit, as long as it only discharges pollutants that have been adequately disclosed to the permitting authority. Id. at *17 ("[T]he discharge of unlisted pollutants is in violation of the CWA unless the applicant makes adequate disclosures to permit authorities during the application process about the

source and nature of its discharges."). To the extent that a permit holder discharges a pollutant that it did not disclose, it violates the NPDES permit and the CWA. Id. at *13 ("[W]here the discharger has not adequately disclosed the nature of its discharges to permit authorities, and as a result thereof the permit authorities are unaware that unlisted pollutants are being discharged, the discharge of unlisted pollutants has been held to be outside the scope of the permit.").

The EPA in Ketchikan therefore outlined the proper structure for the permitting process. The applicant discloses the nature of its effluent discharges to the permitting authority. The permitting authority analyzes the environmental risk posed by the discharge, and places limits on those pollutants that, in the words of the Second Circuit and EPA, it "reasonably anticipates" could damage the environmental integrity of the affected waterway. Id. at *11; Atlantic States Legal Found., 12 F.3d at 358 (internal citations omitted). Thus, as long as a permit holder complies with the CWA's reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit. Ketchikan, 1998 WL 284964 at *11. The only other limitation on the permit holder's ability to discharge such pollutants is that the discharges must be reasonably anticipated by, or within the reasonable contemplation of, the permitting authority. Id. at *11. Because the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment, discharges not within the reasonable contemplation of the permitting authority during the permit application process, whether spills or otherwise,

do not come within the protection of the permit shield. We see the EPA's interpretation of the permit shield as a rational construction of the CWA's statutory ambiguity; as such, we deem it "reasonable" within the meaning of a Chevron analysis. See Chemical Mfrs., 470 U.S. at 125. Therefore, because the CWA provision in question, § 1342(k), is ambiguous, and because the EPA's interpretation of this provision is reasonable, we must defer under Chevron to the EPA's interpretation of the scope of an NPDES permit.[11]

Thus, the scope of the permit shield defense is relatively straightforward. An NPDES permit holder is shielded from CWA liability for discharges in compliance with its permit, and is liable for any

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[11] Prior to its Ketchikan decision, the EPA in 1994 published a policy statement on the scope of the permit shield defense that mirrors its holding in Ketchikan. That statement provides in relevant part:

> A permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, waste-streams and operations that have been clearly identified in the permit application process when discharged from specified out-falls:
>
> * * *
>
> 2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified as present in facility discharges during the permit application process[.]

Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES permits at 2_3 (July 1, 1994) (emphasis added).

discharges not in compliance with its permit. As the EPA has determined, however, compliance is a broader concept than merely obeying the express restrictions set forth on the face of the NPDES permit; all discharges adequately disclosed to the permitting authority are within the scope of the permit's protection. Having examined the nature of liability under the CWA, we turn to whether, in this case, the Plant's discharge of heat during the period in question was in violation of its NPDES permit and the CWA.

C.

1.

The Commissioners would be in violation of their NPDES permit through the Plant's discharge of heat if either: (1) the permit specifically barred such discharges; or (2) the Commissioners did not adequately disclose them to the MDE. Section I of the Commissioners' NPDES permit expressly limits the discharge of certain pollutants, such as dissolved oxygen and fecal coliforms, but makes no mention of heat. Under the permitting process previously explained, that would indicate, assuming proper disclosure of its heat discharges, that the Commissioners did not violate the CWA. A footnote to the list of pollutants in the Commissioners' NPDES permit provides, however, that the "discharge of pollutants not shown shall be illegal." J.A. 1553. A plain application of this footnote, which is urged upon us by the Association, is that it is illegal for the Plant to discharge any pollutants not specifically listed in the permit at any level. Because heat is not listed in the

NPDES permit, imparting this meaning to the footnote provision would render illegal the discharge of heated effluent by the Plant. The Commissioners, however, view the footnote as prohibiting only those pollutants that were not disclosed to the MDE during the permitting process. In other words, the Commissioners read the footnote as providing, "the discharge of pollutants not shown [to the MDE during the permitting process] shall be illegal."

In analyzing a provision of an NPDES permit, we review the district court's interpretation in the same manner as we would contracts or other legal documents. See Hendricks v. Central Reserve Life Ins. Co., 39 F.3d 507, 512 (4th Cir. 1993) (applying rules of contract interpretation to benefit plan provision in ERISA lawsuit); see also Northwest Envt'l. Advocates v. Portland, 56 F.3d 979, 982 (9th Cir. 1995) (applying principles of contract interpretation to NPDES permit). We review the district court's application of contract principles de novo, but review its findings of fact with respect to extrinsic matters for clear error. Hendricks, 39 F.3d at 512.

A proper interpretation of the footnote requires that we first determine whether it is ambiguous; if "the language is plain and capable of legal construction, the language alone must determine" the permit's meaning. FDIC v. Prince George Corp., 58 F.3d 1041, 1046 (4th Cir. 1995). If the footnote is ambiguous, however, then we must look to extrinsic evidence to determine the correct understanding of the permit. See Northwest Envt'l. Advocates, 56 F.3d at 983-984. Having carefully examined the footnote, we conclude that it is ambiguous. Although the footnote specifies that "the discharge of pollutants not shown shall be illegal," it

fails to indicate either to whom or where the pollutants must be shown in order to fall within the NPDES permit's protection. Both of the interpretations offered by the parties, i.e., (1) that the pollutants must be shown in the language of the permit, and (2) that the pollutants must be shown during the permit application process, are entirely reasonable readings of the footnote. Given this ambiguity, we must turn to extrinsic evidence to determine the intent of the permitting authority in drafting this footnote.

Examining the footnote in the context of the entire NPDES permit and the permitting process persuades us that the interpretation offered by the Commissioners is the correct one. Indeed, another section of the NPDES permit anticipates that the Plant will discharge new, unlisted pollutants. Pursuant to Section II.A.1 of the permit, titled "Change in Discharge":

> Any anticipated facility expansions, production increases, or process modifications which will result in new, different, or increased discharge of pollutants shall be reported by the permittee by submission of a new application at least 180 days prior to the commencement of the changed discharge or, if such changes will not violate the effluent limitations specified in this permit, by notice to the Department.

J.A. 1561. This subsection of the NPDES permit indicates that the MDE contemplated, in its issuance, that the Plant would in fact discharge pollutants

other than those expressly listed. To suggest, therefore, that the footnote constitutes a blanket ban on all pollutants not listed in the NPDES permit is problematic. Indeed, the Second Circuit, in its Atlantic States Legal Foundation decision in 1993, interpreted a similar permit provision as inconsistent with a general prohibition on the discharge of new pollutants. Atlantic States Legal Found., 12 F.3d at 359.

In fact, the structure laid out in the "Change in Discharge" provision reflects the permitting process as a whole. Because the focus of that process is to ensure that the MDE possesses sufficient information to calibrate discharge levels so that state water quality standards are met, the NPDES permit mandates that the Plant inform the MDE of future changes in what it discharges. This allows the MDE time to calculate the effects of the change and, if necessary, to modify the permit in order to maintain state water quality standards. If the permit holder is discharging less of a pollutant than originally disclosed, however, the change in discharge poses no risk to the environmental integrity of the system. Therefore, it is no surprise that the "Change in Discharge" provision exempts such cases from the new application process.

Moreover, the logic of the Commissioners' position is apparent when the practical implications of interpreting the footnote as prohibiting the discharge of all pollutants not expressly listed, at any level, are considered. The CWA defines pollutant as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and

industrial, municipal, and agricultural waste discharged into water." See 33 U.S.C. § 1362(6). This definition is extremely broad, covering innumerable individual substances. See, e.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 566 (5th Cir. 1996) ("[T]he definition of "pollutant" is meant to leave out very little . . . ."); Atlantic States Legal Found., 12 F.3d at 357 (noting that there is "no principled reason why water itself, which is conceded to be a chemical, would not be considered a `pollutant' under . . . the Act"). Thus, if we were to adopt the interpretation urged by the Association, the Plant would violate the terms of its NPDES permit (thereby giving rise to monetary and injunctive relief under the CWA) if it discharges an unlisted pollutant even at an infinitesimal amount.

We are not persuaded that the MDE either intended or contemplated such consequences when it issued the Commissioners' NPDES permit. The provision at issue, an eight-word footnote in a twenty-one page NPDES permit, deals with significantly less controversial topics in great detail. For example, the permit contains a half-page description of the MDE's and EPA's rights of entry. Further, the record contains no evidence that the MDE or any other party discussed this footnote, its provisions, its possible ramifications, or its proper interpretation during the permitting process. If the MDE had intended to impose liability on the Commissioners for the discharge of a fully disclosed but unlisted pollutant at any level, we would expect to find an extended discussion of the consequences of such a decision. Thus, having reviewed and carefully considered the extrinsic evidence concerning the MDE's intent in granting the

Commissioners their permit, we must conclude that the language of the permit itself contains no bar to the Plant's discharges of heat.[12]

2.

The final questions that we must address are whether the Commissioners adequately disclosed the Plant's discharges of heated effluent to the MDE during and after the permit application process, and whether the Plant's discharges of heat were reasonably contemplated by the MDE. If both of these conditions are satisfied, then the Commissioners are protected by the permit shield defense and they are not liable under the CWA.

The record clearly demonstrates that both of these conditions were in fact met. The MDE and the Commissioners each testified that the Commissioners informed the permitting authority that the Plant was discharging heat during the permit application process. See J.A. 1213-21, 1338-44. The record also contains a significant compilation of the daily reports on water temperature and heat discharges provided by the Commissioners to the MDE after the permit was issued in 1990; in addition, there is testimony from the MDE and the Commissioners that the Commissioners filed such reports as required by the permitting authority.

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[12] Although adopting the Commissioners' interpretation of the footnote suggests that it simply represents the codification of the preexisting permit shield defense, it is important to recognize that the permit was issued in 1990, eight years before the EPA's decision in Ketchikan. When the permit was issued the scope of the permit shield defense was not clear, and therefore an effort by the MDE to shield all properly disclosed pollutants from CWA liability was not redundant.

The evidence thus demonstrates that the Commissioners complied with permit and CWA disclosure requirements. Furthermore, the testimony of the MDE and the Commissioners shows that the MDE reasonably contemplated that the Plant would discharge heat pursuant to its permit, and the temperature records demonstrate that the Plant did not act outside that reasonable contemplation. Therefore, the Commissioners are entitled to the full protection of the permit shield, and they are not liable under the CWA.

IV.

For the foregoing reasons, the judgment of the district court must be vacated, and we remand for the entry of judgment in favor of the Commissioners.

VACATED AND REMANDED

United States District Court,
D. Maryland.

THE PINEY RUN PRESERVATION ASSOCIATION
v.
COUNTY COMMISSIONERS OF
CARROLL COUNTY, MARYLAND.

No. CIV. Y-98-3124.

Feb. 10, 2000.
[Entered: February 10, 2000]

MEMORANDUM OPINION

YOUNG, Senior District Judge.

I.

The Piney Run Preservation Association ["the Association"] is a non- profit citizens' group whose activities include the protection of a stream known as Piney Run in Baltimore County, Maryland. Members of the Association reside in Baltimore County in the vicinity of the stream. The Maryland Department of the Environment ["MDE"] has designated Piney Run a Class III-P stream, which signifies that it supports the growth and propagation of trout and serves as a source of public drinking water. The Defendant, the County Commissioners of Carroll County ["the County"], operates a sewage treatment plant ["the Plant"] in Hampstead, Carroll County, Maryland. The Plant discharges treated sewage into Piney Run pursuant to a National Pollution Discharge Elimination System

["NPDES"] permit issued by MDE. The permit allows the County to discharge certain listed pollutants into Piney Run, but heat is not one of the pollutants listed in the permit.

In 1991, the County sought to modify its permit to increase the amount of effluent it discharged into Piney Run. After MDE determined that the increased effluent would comply with all applicable requirements, several landowners challenged the determination and requested an administrative hearing. They asserted that the Plant's current level of discharge violated the maximum temperature criterion for a Class III-P stream and contended that an increased flow would continue the thermal pollution of the stream. The temperature criterion at issue is found in the Maryland Administrative Code ["COMAR"], which under the heading "Criteria for Use III Waters--Natural Trout Waters," contains the following provision: "The maximum temperature outside the mixing zone ... may not exceed 68 <<degrees>> F (20 <<degrees>> C) or the ambient temperature of the surface waters, whichever is greater." COMAR § 26.08.02.03-3E.

The Circuit Court for Baltimore County affirmed MDE's decision in 1997. The landowners appealed to the Court of Special Appeals, which reversed the Circuit Court on August 17, 1998, and remanded the case to MDE for further factual findings. ***466** Specifically, the court instructed MDE to determine: (1) with respect to the Plant and its discharge of effluent, where to measure the ambient temperature of Piney Run; (2) what the ambient temperature is in this case; (3) whether, at the current level of discharge, the temperature outside the mixing zone exceeds 20

<<degrees>> C or the ambient temperature of the surface waters, whichever is greater; and (4) whether, with the proposed increase in effluent, the temperature outside the mixing zone will exceed 20 << degrees>>>> C or the ambient temperature of the surface waters, whichever is greater. MDE has not yet made its determination.

The Association filed this suit on September 16, 1998, alleging that the County violated the terms of its permit by discharging heat into Piney Run. On May 20, 1999, the Court granted partial summary judgment to the Association, finding that the County had violated the Clean Water Act ["CWA"]. *Piney Run Preservation Ass'n v. County Commissioners of Carroll County*, 50 F.Supp.2d 443 (D.Md.1999)(hereinafter "*Piney Run I*"). This ruling followed the Ninth Circuit in holding that citizens have standing to bring suit under the CWA to enforce water quality standards that have not been reduced to specific quantitative limitations in a NPDES permit. *See id.* at 445 (following *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 985-90 (9th Cir.1995)).

The Court also found that the Association established 183 CWA violations by the County. *Id.* at 446-47. Specifically, the Association provided undisputed temperature readings indicating that on 183 occasions, the County discharged waste water with a temperature exceeding the greater of either 68 <<degrees>> F (20 <<degrees>> C) or the ambient temperature of Piney Run. *See* COMAR § 26.08.02.03-3E. In reaching its decision, the Court interpreted the term "ambient" in the Maryland Administrative Code to mean "encompassing," "atmospheric" or "surrounding on all sides." *See*

Letter from the Court, Dec. 15, 1999. In this case, therefore, "ambient temperature" meant the temperature of the waterway into which the County made its discharges. Because the temperature of the Plant's effluent exceeded either 68 <<degrees>> F or the temperature of Piney Run upstream of the Plant on 183 separate days, the Court found 183 violations of the CWA. The issue of damages was set for trial.

The County filed a motion for reconsideration with this Court and a petition for leave to file an interlocutory appeal with the Fourth Circuit. Both were denied. On October 27, 1999, the County again moved for reconsideration. The Court denied that Motion by marginal order on December 15, 1999.

Between June 1 and November 4, 1999, the County collected and recorded temperature data from four locations on Piney Run: two locations upstream of the Plant's outfall and two locations downstream. The County also recorded the temperature of the Plant's effluent. These temperature readings were automatically taken by fixed "temperature loggers" every fifteen minutes, twenty-four hours a day, seven days a week. The parties agree that these temperature data are reliable, but differ as to the proper interpretation of the data and the conclusions the Court should draw from it. The Association argues that the County has violated the CWA because the Plant's effluent has exceeded the upstream temperature of Piney Run or 20 <<degrees>> C, whichever was higher, during at least one reading on 107 separate

days.[1] In contrast, the County points out that the temperature of the Plant's effluent infrequently exceeded the highest upstream temperature of Piney Run on any given calendar day. The County argues, therefore, that *467 something other than the Plant is heating Piney Run.

On November 12, 1999, the Association moved for summary judgment, seeking the Court's ruling on alleged CWA violations from June 1, 1999, through August 12, 1999. The County opposed the Motion and filed a Cross-Motion for Summary Judgment on November 29, which the Association opposed. The Court denied both Motions on December 15, 1999, due to disputed issues of material fact. A three-day non-jury trial was held on January 20, 21, and 24, 2000.

II. Discussion

A. *Standing*

In *Piney Run I,* the Court held that the Association had standing to bring this CWA citizen suit to enforce state water quality standards for heat, even though heat is not listed as a pollutant in the Plant's permit. 50 F.Supp.2d at 445. The County now argues, however, that the Association lacks standing to bring this suit under Article III of the Constitution. Specifically, the County claims that the Association's

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[1] The Association has also asked the Court to find that the County violated the CWA on every day that the Plant's effluent exceeded the upstream temperature of Piney Run. In *Piney Run I,* however, the Court made clear that a violation occurs only where the Maryland water criterion is violated, i.e., when the effluent temperature exceeds 68 <<degrees>> F (20 <<degrees>> C) or the ambient temperature of the surface waters, whichever is greater.

members have not suffered a "particularized" injury that is traceable to the CWA violations involved in this case.

[1] The Court disagrees. To meet the "case or controversy" standing requirements under Article III, a plaintiff[2] must show "(1) that it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, --- U.S. ----, 120 S.Ct. 693, 703, 145 L.Ed.2d 610 (2000). In *Friends*, an environmental group filed a citizens suit under the CWA seeking damages and injunctive relief related to pollution of the North Tyger River. Members of the group provided testimony and affidavits stating that they lived within several miles of the polluting facility and saw and smelled the contaminated river. *See id.* at 704. They also stated that they desired to use the area near the river for fishing, camping, and hiking, as they once had, but were prevented from doing so by concerns about pollution. *See id.* The Supreme Court held that the group had standing because the members' affidavits and testimony alleged that the discharges to the river and "reasonable concerns about the effects of those discharges" directly affected the members' "recreational, aesthetic, and economic interests." *Id.* at 705.

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[2] An association may bring suit on behalf of its members when the members have standing as individuals. *See United Food & Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996).

[2] In light of the standards enunciated in *Friends*, the Association clearly has standing to bring the present suit. To begin, the Association presented the testimony of two landowners whose property is crossed by Piney Run. Perhaps no person is more likely to have Article III standing in a CWA citizen suit than a landowner whose land abuts or surrounds the water body at issue. Such a landowner undoubtedly suffers injury "in fact" from the reasonable fears of pollution on the borders of his or her property. Moreover, the landowner must cope with the loss of recreation, aesthetics, and economic value that the polluted waterway once brought to the land. Provided that the effects are real and traceable to the violations at issue, it would be hard to imagine a more "particularized" injury.

In this case, the Association provided the testimony of Dorothy Rowland, who stated that Piney Run bisects her property, which she purchased more than 30 years ago and uses to raise horses. She testified that, at one time, her horses took water from Piney Run, she enjoyed the stream as a source of recreation, and her children ice-skated on it in cold weather. In recent years, however, Ms. Rowland ***468** has seen Piney Run turn green with algae, and her fears about the stream's condition have caused her to stop watering horses from it. Furthermore, the stream no longer freezes, even during periods of very cold weather. Because these allegations present a clear instance of particularized injury in fact, the Court holds that Ms. Rowland has standing to bring the present suit.

Two other members of the Association provided similar testimony. Victoria Woodward owned property along Piney Run. She described the expanding algae in the river and her belief that the stream's pollution

reduced the economic and recreational value of her property. Edward Halle testified that he can see Piney Run from his house and would like to use it for fishing and for recreation with his children, but will not do so because of the stream's condition. Mr. Halle decided to keep his children from playing in the stream after he noticed that Piney Run was green with algae, in contrast to the other clear streams that join Piney Run downstream from the Plant. Given that both Ms. Woodward and Mr. Halle alleged that they use Piney Run and are persons "for whom the aesthetic and recreational values of the area [have been] lessened" by the Plant's heat discharges, they have standing under Article III and, therefore, the Association is entitled to bring a citizens suit on their behalf. *See id.* at 705.

B. *Motion to Strike the Testimony of Dr. Stauffer* [3]

The County moved at trial and filed a post-trial motion to strike the testimony of Dr. Stauffer--an expert witness proffered by the Association-- insofar as it concerns the effects of water temperatures below 68 <<degrees>> F (or 20 <<degrees>> C) on brown trout. This testimony, contends the County, is irrelevant because the Association is seeking damages for CWA violations relating to discharges that exceeded Maryland regulatory limits of 68 << degrees>>>> C.

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[3] The County also moved after trial to exclude the opinion testimony of Dr. Bouwer, the Association's other expert witness. The Court permitted the County to file its opposition to Dr. Stauffer's testimony in a post-trial memorandum, but because no serious dispute was raised with regard to the bulk of Dr. Bouwer's testimony during trial, the Court refuses to address the broad relevance issues now raised by the County.

[3] The Court agrees, but only in part. The regulation at issue prohibits discharges that exceed the higher of 68 <<degrees>> F (20 <<degrees>> C) or the ambient temperature of the surface waters. Because most of the violations in this case involve discharges at temperatures over 68 <<degrees>> F, the portion of Dr. Stauffer's testimony relating to lower temperatures has only minor significance. At the same time, however, the Association proved that on various occasions the Plant discharged effluent at a temperature that was lower than 68 <<degrees>> F but higher than the ambient temperature of Piney Run. Dr. Stauffer's disputed testimony is relevant to these discharges. The Court, therefore, refuses to strike Dr. Stauffer's testimony on this issue, but has considered it in accordance with these findings.

The County also argues that Dr. Stauffer's testimony should be stricken because his opinions on brown trout populations in Piney Run "are based upon critical unsubstantiated assumptions that are not supported by any factual evidence in the case nor grounded in established scientific theory or reasoning." In particular, the County is concerned about the absence of conclusive evidence that Piney Run above Trenton Road does not currently contain brown trout or that it ever did contain brown trout. [4]

[4] The Court refuses to strike the testimony. Although numerous factors come into play when a district judge makes the "gatekeeping" determination on a proffer of expert testimony, the Court's *469 evaluation is flexible and seeks primarily to ensure that

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[4] Evidence such as this is relevant not to liability, but only to damages, for a violation of the state regulation is a violation of the CWA, whether or not brown trout populations were affected.

the testimony is relevant and reliable. *See* *Oglesby v. General Motors Corp.*, 190 F.3d 244, 250 (4th Cir.1999). Here, the evidence of damage to brown trout is not conclusive,[5] but the testimony presented by Dr. Stauffer is supported by facts in the record and, therefore, is admissible. The record shows that Piney Run supports brown trout at Trenton Road and downstream from that location. MDE has classified the stream as a Class III-P waterway, indicating that it is capable of supporting the growth and propagation of trout. Based on his examination of the stream and his expertise as an ichthyologist experienced in waters of the region, Dr. Stauffer agreed with this classification. He also testified that typical spring-fed streams in the region support trout upstream in the colder locations, but trout populations generally diminish downstream because of natural warming. Piney Run, in contrast, contains trout downstream, but not upstream in the vicinity of the Plant. In addition, Dr. Stauffer testified that high stream temperatures inhibit the growth of trout and discourage trout migration, and the record shows that the Plant has added heat to Piney Run.

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[5] In its Motion, the County focuses on Dr. Stauffer's assumption that there are no brown trout in Piney Run above Trenton Mill. The County points out that although this assumption forms the basis for all of Dr. Stauffer's testimony, he cannot be absolutely sure that the assumption is accurate. The Court notes, however, that there is no evidence in the record to indicate that trout *do* currently reside in Piney Run upstream of Trenton Mill. Indeed, the only evidence is to the contrary. If there are trout in Piney Run near the Plant, the County had the means to find them and present evidence thereof. It has not. To argue that the assumptions behind Dr. Stauffer's opinions "are not ... subject to objective, scientific validation," Def.'s Renewed Mot. to Strike Testimony at 17, therefore, is somewhat disingenuous.

Given this factual scenario, Dr. Stauffer opined that Piney Run once supported brown trout in the vicinity of the Plant, but the Plant's effluent could be inhibiting trout migration or propagation in the areas of Piney Run upstream from Trenton Road. The Court finds that this opinion, like many expert opinions, was based on an assumption, but that assumption is supported by evidence in the record. *See* Tyger Constr. Co. v. Pensacola Const. Co., 29 F.3d 137, 142-43 (4th Cir.1994). Moreover, although one may doubt whether Dr. Stauffer's conclusions are ultimately correct, the Court finds that the underlying reasoning and methodology of the testimony was reliable, scientifically valid, and applicable to the facts in this case. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590-93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Court finds that Dr. Stauffer's opinions would be helpful to the trier of fact in determining the damage caused to Piney Run by the Plant's added heat. *See id.* at 591, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469.

C. *Liability*

In *Piney Run I*, the Court held that the Plant violated the CWA by discharging effluent into Piney Run with a temperature exceeding the higher of 20 <<degrees>> C or the ambient temperature of Piney Run. The undisputed temperature data for the period between July 1, 1999, and November 4, 1999, indicate that the temperature of the Plant's effluent violated this standard on 107 additional days. Adding this sum to the 183 violations identified in *Piney Run I*, the Court finds a total of 290 CWA violations.

[5] The Association argues that *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 527 (4th Cir.1999), requires the Court to impose a penalty for each instance that the Plant's effluent exceeded the heat standard on the same day. The Court disagrees. Under *Smithfield*, courts should impose damages on a parameter-by-parameter basis for any given day. In other words, if a polluter's discharge exceeds two separate permit limitations on the same day, then each excess qualifies as ***470** a separate infraction, even if caused by the same waste stream. *See id.* at 528 n. 6. However, in the present case, the Association has proved that the Plant violated only one parameter--heat-- though it may have done so various times on a given day. Although imposing a penalty for multiple violations of the same effluent limit may be appropriate in some circumstances, the Court is not prepared to do so under the facts of this case. The penalty structure of the CWA gives courts "considerable flexibility to tailor penalties to the unique facts of each case." *Id.* at 527. As discussed more fully below, this case involves several important mitigating factors that compel the Court to impose only one penalty for any day the Plant violated State thermal pollution limits.

D. *Monetary Damages*

Courts have the authority to impose a maximum civil penalty of $25,000 per day for each violation of the CWA. *See* 33 U.S.C. § 1319(d); *Smithfield Foods*, 191 F.3d at 527. In determining the amount of any civil penalty under the CWA, however, the Court must consider six factors: "the seriousness of the violation or

violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and other such matters as justice may require." § 1319(d).

When calculating damages, courts generally employ either a "top-down" or "bottom-up" method. *See Smithfield*, 191 F.3d at 528. Courts following the "top-down" method first calculate the maximum penalty based on the $25,000 per day figure, then adjust the figure down, as necessary, to account for the six factors listed in § 1319(d). *See id.* at 528 n. 7. In contrast, the "bottom up" method requires the Court to determine the economic benefit the defendant derived by violating the Act, and then adjust that figure upward or downward using the remaining five factors in § 1319(d). *See id.* at 528. Because the Act does not prescribe a particular method, the Court has discretion to choose. *See id.* The "highly discretionary calculations necessary to assess penalties [under the CWA] are particularly within the purview of trial judges" and, therefore, are granted wide deference. *Id.* at 529 (citing *Tull v. United States*, 481 U.S. 412, 426-27, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987)).

Considering all the circumstances in the present case, a bottom-up approach is most appropriate. The starting point under this approach is the economic benefit the County gained by delaying compliance with the CWA. Because precise economic benefit is difficult to prove, "reasonable approximations ... will suffice." *Smithfield*, 191 F.3d at 529. The trial testimony indicated that the County has considered as many as four options to address its thermal pollution issues.

Much of the testimony focused on a method of cooling the Plant's discharge by means of air-cooled "chillers." When the County undertook a feasibility study to evaluate options for cooling the Plant's effluent, it determined, based on a consultant's report, that the air-cooled chillers were the preferred option. Although this method involved lower initial costs than the other alternatives considered by the County,[6] it also required higher operational costs due to electricity demand. As such, the Court finds that the air-cooled chillers option provides a fair estimate of the County's "avoided cost" or economic benefit.

Furthermore, the Court determines that this cost should be calculated from November 1998, the date of the County's feasibility study. Although the County may have been aware of its thermal pollution at an earlier date, the feasibility study is the clearest indicator of the time the County recognized it as a problem. Using this later date also accounts for the months, if not years, of permit applications and approvals the County would have needed to install the chillers. Evidence introduced *471 by the Association indicates that the initial cost of installing the chillers would have been $967,500 and annual costs, including operating expenses, would have been approximately $208,000 per year.[7] Because this case covers violations

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[6] The other alternatives were geothermal chillers and night cooling.

[7] These costs appear in Plaintiff's Exhibit No. 38, the Hampstead Wastewater Treatment Plant Effluent Temperature Reduction Study, Carroll County Project No. S-306 (Nov.1998), which was prepared by an engineering consultant. The sums are in 1998 dollars and the annual cost figure is based on a 7% interest rate on the initial cost, spread over ten years, plus operational cost.

through November 1999, the Court will add one year's annual cost to the initial cost figure, rounding upward to approximate the shift from 1998 dollars to 1999. This adjustment brings the "reasonable approximation" of the County's economic benefit to $1.2 million.

Once the Court determines the defendant's economic benefit, the total penalty should be adjusted up or down, as necessary, considering the remaining five factors in § 1319(d). *See Smithfield*, 191 F.3d at 528. The Court makes the following findings with regard to those five factors:

1. *Seriousness of the Violations*

To determine the seriousness of the County's violations, the Court should consider the frequency and severity of the violations as well as their effect on the environment. *See United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 343 (E.D.Va.1997). Although the Association has established 290 violations and has proved that the County added heat to Piney Run, the extent of damage caused by these violations is far from clear. The Association provided expert testimony to demonstrate that thermal pollution may induce algae growth and hamper brown trout development and propagation. At the same time, the County established that the heating of Piney Run, the growth of algae, and the diminution of brown trout could be linked to a variety of factors, including nutrients from agricultural activities, runoff from development, or stormwater collection activities. Moreover, on certain occasions, even though the Plant's effluent exceeded regulatory limits, it was cooler than upstream temperature

readings in Piney Run. In short, although the Association proved that the Plant added heat and that thermal pollution has had a deleterious effect on Piney Run, it did not prove the extent of harm attributable to the Plant or even that the Plant is the major factor in the demise of Piney Run as a trout stream.

Nevertheless, the Court acknowledges that a significant penalty may be appropriate even absent proof of actual negative effect. *See id.* at 344 (citing cases). The Court is convinced that the Plant adds heat to Piney Run and that continued addition of heat will preclude the relevant portion of Piney Run from attracting brown trout in the future. In addition, any damage to Piney Run is exacerbated because it is identified not only as a trout stream, but also as a source of public drinking water. In spite of these considerations, however, the Court finds that this factor weighs in favor of a lower penalty for the County.

2. *History of Violations*

In determining the County's history of violations, the Court considers not only similar violations in the past, but also the duration and continuity of the County's present violations. *See Smithfield Foods*, 972 F.Supp. at 349. Testimony at trial indicated that the County recognized thermal discharges as a potential problem beginning as early as 1992. The County also established, however, that it did not consider these discharges to be permit violations, and the Court finds that this interpretation was not unreasonable. As discussed more fully below, the County believed, based on its own colorable legal

determinations and experience with MDE, that it was in compliance with its permit provided that its discharges remained within explicit limitations in the permit. The Court is aware that the CWA is a ***472** strict liability statute, *see* id. at 342 (citing *Stoddard v. Western Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir.1986)), but courts have discretion to adjust damages based on culpability, *see* 33 U.S.C. § 1319(d); *Smithfield Foods*, 972 F.Supp. at 353. In the present case, this factor justifies a downward adjustment in the County's penalty.

3. *Good-Faith Efforts to Comply*

Although significant efforts to mitigate negative environmental effects or to decrease the number of violations may justify a reduced damages award, *see Smithfield Foods*, 972 F.Supp. at 349-50, the Court finds the evidence in this area to be inconclusive. In short, the record shows that the County took several initial steps--e.g., studying options, submitting permit applications-- to address its thermal pollution problems. Although the County may have experienced delays in obtaining the necessary permits, due in some part to factors beyond its control, it made no notable effort to expedite the process. The County's leisurely pace, the Court finds, cancels out its earlier efforts to come into compliance.

The record also shows that the County attempted to improve the Piney Run ecosystem by removing the concrete channel in favor of a naturally meandering stream. The County did not undertake this project with the aim of reducing thermal pollution, but the Court acknowledges that the improvement of

Piney Run would make it more likely to support brown trout populations, thus reducing the harm alleged in this case. The final damages determination, therefore, will reflect a credit for the County's effort.

4. *Economic Impact of the Penalty on the County*

The central purpose of CWA penalties is to deter the defendant, and others, from committing future violations. *See* *Smithfield Foods*, 972 F.Supp. at 352. A damage award that is limited to economic benefit, therefore, is no deterrent at all because the violator would be no worse off than if it had complied in the first place. *See id.* In this context, municipalities--such as Carroll County--are distinct from private actors. Whereas a large penalty passed on to consumers in the form of higher prices may have a significant effect on a private polluter, a municipal polluter merely passes the costs on to its taxpayers who, in turn, have no option other than to pay the tax. Moreover, the testimony at trial showed that the County has already applied to install chillers and has allocated the necessary funds. In other words, the County is poised to remedy its violations. *Cf. id.* at 350. As such, it appears that the years of litigation on this matter, in concert with the injunction to be issued by this Court, will be sufficient to halt the Plant's violations. Additional deterrent in the form of a large penalty, therefore, is not necessary and would not serve a useful function at this time.

5. *Other Such Matters as Justice may Require*

Courts may adjust CWA penalties to account for the bad-faith conduct of the violator and its attitude towards achieving compliance. *See* id. at 353. The particular circumstances of this case deserve special attention under this factor. Until recently, the County believed that compliance with its permit was tantamount to compliance with the CWA--a doctrine known as the "permit shield." Although the Court has found that this belief was mistaken and an improper interpretation of existing law, the Court also finds that the County's position was not unreasonable. Moreover, this interpretation relied, in part, on prior experience and interaction with State permit authorities. Because the law was unclear and the County had a good faith belief in the permit shield doctrine, the Court finds that a downward adjustment of the penalty would be appropriate.

6. *Conclusion*

[6]Based on an evaluation of the factors above, the Court will adjust the penalty ***473** figure downward to $400,000. This calculation accounts, in particular, for the Defendant's municipality status and its prior understanding of the permit shield doctrine, as well as a credit for removing the concrete channel on Piney Run.

E. *Injunctive Relief*

[7]The CWA authorizes district courts to enter injunctions in citizen suit proceedings. *See* 33 U.S.C. § 1365(a); *Friends*, 120 S.Ct. at 700. Considering the Court's findings that (a) the Plant continues to violate

the CWA, (b) the Plant continues to add heat to Piney Run, and (c) these activities have a deleterious effect on Piney Run and members of the Association, injunctive relief is appropriate. Therefore, the Court will issue an injunction to address the specific injuries at issue. The Court's order will enjoin the Plant from discharging effluent into Piney Run at temperatures that exceed the higher of 20 <<degrees>> C or the ambient stream temperature until MDE modifies the existing permit or issues a new permit to account for the unique aspects of Piney Run as a Class III-P stream and to comply with all relevant federal and state standards. To ensure compliance with this injunction, the Court will maintain jurisdiction over the case.

F. *Costs and Fees*

[8]In addition to monetary and injunctive relief, the CWA provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). In consideration of the Association's efforts in this case, and its success in proving 290 violations of the CWA, the Court will award costs and reasonable attorneys fees to the Association. As noted at the trial, the Association must file its petition for costs and fees within ten days of judgment.

III. Conclusion

Based on the foregoing analysis, the Court finds that the County is liable for 290 violations of the CWA. The Court will order the County to pay a penalty of $400,000 to the United States Treasury in accordance with the CWA, plus costs and reasonable attorneys fees to the Association. The Court will also issue an injunction to protect Piney Run from further thermal pollution.

ORDER

In accordance with the attached Memorandum, it is this 10th day of February 2000, by the United States District Court for the District of Maryland, ORDERED:

1. That the Defendant IS LIABLE for 290 violations of the Clean Water Act and SHALL PAY to the U.S. Treasury the sum of $400,000, plus all costs and reasonable attorneys fees to the Plaintiff; and

2. That the Defendant SHALL CEASE any and all discharges of effluent into Piney Run at temperatures that exceed the higher of 20 <<degrees>> C or the ambient temperature of Piney Run until such time as the Maryland Department of the Environment either: (a) modifies the existing permit to account for the unique aspects of Piney Run as a Class III-P stream and to comply with all relevant federal and state standards as set forth in this Court's decisions; or (b) issues a new permit that accounts for the unique aspects of Piney Run as a Class III-P stream and complies with all relevant federal and state standards as set forth in this Court's decisions.

3. That JUDGMENT BE ENTERED in favor of the Plaintiff; and

4. That copies of this Memorandum and Order be mailed to counsel for the parties.

END OF DOCUMENT

United States District Court,
D. Maryland.

The PINEY RUN PRESERVATION ASSOCIATION,
Plaintiff,
v.
COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,
Defendant.

No. Civ.A. Y-98-3124.

May 20, 1999.
[Entered May, 20, 1999]

MEMORANDUM

JOSEPH H. YOUNG, District Judge.

The Piney Run Preservation Association ("Association") filed this suit against the County Commissioners of Carroll County, Maryland ("County"), alleging violations of the Clean Water Act ("Act"), 33 U.S.C. § 1251 et seq. Plaintiff seeks partial summary judgment on the issue of liability, and defendant has filed a motion for summary judgment.

***444** I.

The Association is a non-profit association whose activities include the protection of the Piney Run Stream in Baltimore County, Maryland. Members of the Association reside in Baltimore County in the vicinity of the Piney Run Stream. Defendant operates a sewage treatment plant ("Plant") in Hampstead, Carroll County,

Maryland, located near the border of Carroll County and Baltimore County. The Plant discharges treated sewage into the Piney Run, a Class IIIP stream. A Class III stream is a stream which supports the growth and propagation of trout. The designation "P" identifies the stream as a source of public drinking water.

The Maryland Department of the Environment ("MDE") issued a National Pollutant Discharge Elimination System ("NPDES") permit to defendant. *See* NPDES Permit Number MD0022446 (also referred to as 88-DP-0594), Ex. B to Plaintiff's Motion for Partial Summary Judgment. The NPDES permit allows defendant to discharge certain amounts of listed pollutants into the Piney Run. Heat is not one of the pollutants listed on the permit.

NPDES Permit Number 88-DP-0594 was scheduled to expire on February 28, 1995. Because MDE has not yet issued a new permit, that permit remains effective until the new permit is issued. In 1991, defendant sought to have the amount of permitted effluent increased from 500,000 gallons per day ("gpd") to 900,000 gpd. Before allowing such an increase, MDE must make a determination that the proposed discharge will comply with all applicable requirements, including those of the Act. *See* COMAR § 26.08.04.02. MDE made such a determination when it approved the increase in 1993.

Several Baltimore County landowners whose land is bisected by the Piney Run (and at least one of whom is a member of the Association) requested an administrative hearing, contesting the MDE's determination to issue the modified permit. They asserted that the Plant's current level of discharge (500,000 gpd of effluent) violated the maximum

temperature criterion for a IIIP stream, and that an increase in the flow of effluent would continue the "thermal pollution" of the stream. After a hearing, the Administrative Law Judge (ALJ) rendered a Proposed Decision and Order on January 4, 1996 to uphold the MDE's decision to grant the modified permit. The landowners filed exceptions to the proposed decision. On November 20, 1996, the MDE's Final Decision Maker (FDM) affirmed the MDE's determination to allow the County to increase the flow of effluent from the Plant. The landowners sought review of the MDE's final decision in the Circuit Court for Baltimore County. On August 22, 1997, the Circuit Court affirmed the MDE's decision.

The landowners then appealed to the Maryland Court of Special Appeals. On August 17, 1998, the Court of Special Appeals reversed the Circuit Court's decision and remanded the case to MDE for further factual findings. Specifically, the court instructed MDE to determine: (1) with respect to the Plant and its discharge of effluent, where to measure ambient temperature of the Piney Run; (2) what the ambient temperature measurement is in this case; (3) whether, at the current level of discharge, the temperature outside the mixing zone exceeds 20 Celsius or the ambient temperature of the surface waters, whichever is greater; and (4) whether, with the proposed increase in effluent volume, the temperature outside the mixing zone will exceed 20 Celsius or the ambient temperature of the surface waters, whichever is greater. On February 17, 1999, MDE held a hearing regarding the proposed changes, but MDE has not made a determination regarding the proposed changes to the NPDES permit.

On July 8, 1998, plaintiff gave notice of the defendant's alleged violations of the Act to the defendant, MDE, and the United States Environmental Protection Agency ("EPA") and on September 16, 1998, filed this suit alleging that the defendant *445 has violated the terms of its MPDES permit by discharging heat into the Piney Run.

II.

Plaintiff filed this suit under 33 U.S.C. § 1365, the citizen suit provision of the Act. This section provides that when state and federal governments have failed to enforce an NPDES permit, citizens may bring a civil suit against "any person ... who is alleged to be in violation of ... an effluent standard or limitation under this Act." Plaintiff gave the required 60 days' notice to the appropriate parties before filing this suit. *See* 33 U.S.C. § 1365(b)(1)(A). Defendant has presented no evidence that EPA or MDE has addressed the alleged violations.

Plaintiff alleges that defendant has violated its NPDES permit by discharging "heat" into the Piney Run. The Act makes unlawful "the discharge of any pollutant by any person," except in compliance with numerous provisions of the Act, including NPDES permits. *See id.* § 1311(a). A discharge is "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). The term "pollutant" is defined as, among other things, "heat." *Id.* § 1362(6).

As a condition of defendant's NPDES permit, defendant must submit monthly reports to MDE. Among the reported items produced during discovery are the temperatures of the plant influent, plant effluent,

stream above the outfall, and stream sixty feet below the outfall. *See* Hampstead Waste Water Treatment Plant Temperature in Celsius, Ex. G to Plaintiff's Motion for Partial Summary Judgment. Plaintiff has summarized these reports and indicated the days on which the plant effluent temperature exceeded the upstream temperature of Piney Run. *See* Transcription of Temperature Data, Ex. H to Plaintiff's Motion for Partial Summary Judgment. According to these reports, the temperature of the plant effluent has exceeded the upstream temperature on 371 of 397 days. *See id.*

Defendant argues that this Court lacks jurisdiction over a citizen suit regarding a pollutant that is not listed on the alleged polluter's NPDES permit. *See* Atlantic States Legal Found. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir.1993). In *Atlantic States,* the Second Circuit held that "[o]nce within the NPDES or SPDES scheme, therefore, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." *Id.* at 357. However, the Ninth Circuit reached a different conclusion in Northwest Environmental Advocates v. City of Portland, 56 F.3d 979 (9th Cir.1995) ("*NWEA* "), holding that the Act allowed a citizen suit to enforce water quality standards that had not been translated into numerical effluent limitations on a permit. *Id.* at 985-90.

[1] A plain reading of the Act indicates that citizens may bring this type of suit. The citizen suit section provides that any citizen may sue "any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to

such a standard or limitation." 33 U.S.C. § 1365(a)(1). The term "effluent standard or limitation under this chapter" means, among other things, "an unlawful act under subsection (a) of section 1311 of this title." *Id.* § 1365(f). The referenced section provides: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a).

Defendant, in a permitted surreply, has filed an affidavit by defendant's counsel Linda Woolf pursuant to Federal Rule of Civil Procedure 56(f), stating the reasons that defendant needs to conduct further discovery. Pursuant to this Court's scheduling order of December 10, 1998, discovery is to be completed by August 19, 1999. It is therefore entirely reasonable that defendant ***446** had not completed its discovery before plaintiff's motion for partial summary judgment was filed. However, the discovery sought by defendant is irrelevant to the pending motions.

First, Woolf states that many of plaintiff's answers to interrogatories were incomplete, and that these answers were received after the County was required to file its opposition to plaintiff's motion. Specifically, plaintiff failed to respond to interrogatories regarding NPDES permits which include a temperature criterion (Interrog.No. 5), how to measure the ambient temperature of the Piney Run (Interrog.No. 7), and the membership of the Association (Interrogatory No. 21). The first and third interrogatories are irrelevant. Even if no NPDES permit in the country contained an explicit temperature criterion, defendant could still be liable for discharging heat into the Piney Run. It has already been established that at least one member of the Association

has standing to bring this suit; therefore, the Association as a whole has standing. The measurement of ambient temperature is relevant to the pending motions; however, plaintiff has answered that interrogatory. Plaintiff stated that "the best indicator of the 'ambient temperature' is the upstream temperature of the Piney Run." Pl.'s Ans. to Interrog. No. 7. Defendant has not come forward with any evidence to the contrary, nor has defendant explained how further discovery would lead to any evidence to the contrary.

[2] Second, Woolf avers that defendant wishes to take the deposition of C. Victoria Woodward, an Association member whose affidavit was filed with plaintiff's motion for partial summary judgment. By taking Woodward's deposition, defendant would probe the factual basis behind Woodward's affidavit. Absent evidence from defendant that Woodward's affidavit is not credible, such a deposition is unnecessary. Courts have often relied upon affidavits to establish standing in citizen suits. *See, e.g.,* *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1112 (4th Cir.1988); *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F.Supp. 440, 445 (D.Md.1985). *See also* *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556-57 (5th Cir.1996); *Save Our Community v. United States E.P.A.*, 971 F.2d 1155, 1160-61 (5th Cir.1992). Moreover, Woodward's standing as one whose interests have been affected by the Plant has been established by her participation as a plaintiff in the state law suit. There is no indication that defendant seeks this deposition for any reason other than delaying this Court's decision.

Third, defendant received plaintiff's response to its request for production of documents on April 17, 1999, after defendant's opposition had been filed.

Woolf notes that defendant has not yet had an opportunity to review those documents. It is not clear what relevant information defendant could ascertain from those documents. The temperature data plaintiff has proffered come from defendant's own records; therefore, defendant has all of the documentation needed to decide these motions.

Fourth, Woolf states that the County has not yet taken the deposition of either of plaintiff's experts, because defendant wanted to obtain the plaintiff's responses to written discovery and other factual discovery prior to taking their depositions. In particular, defendant intends to ask plaintiff's experts about the conflict between their opinions and the regulations propounded by MDE. This information is irrelevant to this Court's rulings on the pending motions, because plaintiff has already established that defendant violated the MDE regulations. This citizen suit is not the appropriate forum for seeking a change in the applicable MDE regulations.

For the foregoing reasons, summary judgment is granted for plaintiff on defendant's liability for 183 violations of the Clean Water Act. A separate order effecting this ruling is entered herewith.

***447 ORDER**

For the reasons stated in the memorandum filed herewith, it is, this 20th day of May, 1999

ORDERED that

1. Summary judgment is granted in favor of plaintiff on the issue of liability for 183 violations of the Clean Water Act; and

2. The issue of damages will be resolved at the trial scheduled for November 1999.

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1660
September Term, 1997
[entered September Term, 1997]

C. VICTORIA WOODWARD, ET AL.

v.

THE MARYLAND DEPARTMENT
OF ENVIRONMENT

Wenner, Salmon, Byrnes, JJ.

Opinion by Salmon, J.

The Hampstead Wastewater Treatment Plant (the Plant) is located on the Piney Run in Hampstead, Carroll County, Maryland. Since 1974, the Piney Run, a tributary of the Loch Raven Reservoir, has been classified as "Use III" for growth and propagation of trout. The classification was changed in 1990 to "Use III-P" to provide protection for the Piney Run not only as a trout stream but also as a source of public water.

The Maryland Department of the Environment's (the MDE) Water Management Administration issued a National Pollutant Discharge Elimination System (NPDES) permit (the permit) on March 1, 1990, to the

Commissioners of Carroll County (the County), allowing treated wastewater, or effluent, from the Plant to be discharged into the Piney Run at a rate of 0.5 million gallons per day (mgd). Upon petition from the County on January 31, 1991, the MDE made a determination in early 1993 that it would issue a modified permit for the Plant, approving the request to increase the flow of treated effluent to 0.9 mgd.

The appellants in this case are several landowners (the Landowners) whose land in Baltimore County is bisected by the Piney Run. The Landowners requested an administrative hearing, contesting the MDE's determination to issue the modified permit. Their challenge was based on an assertion that the Plant's current level of discharge – 0.5 mgd of effluent – violated the maximum temperature criterion for the "Use III-P" Piney Run water and that an increase in the flow of effluent would continue the "thermal pollution" of the stream.

A hearing was held on May 30 - 31 and June 5, 1995, before the Office of Administrative Hearings. On January 4, 1996, the administrative law judge (the ALJ) rendered a Proposed Decision and Order to uphold the MDE's decision to grant the modified permit. The Landowners filed exceptions to the proposed decision. On November 20, 1996, the MDE's Final Decision Maker (the FDM) affirmed the MDE's determination to allow the County to increase the flow of effluent from the Plant. Appellants sought review in the Circuit Court for Baltimore County. On August 22, 1997, the circuit court affirmed the MDE's decision.

Appellants filed a timely appeal and present two questions for our review, which we have rephrased slightly:

1. Did the MDE's Final Decision Maker err in deciding that the issuance of the permit would not violate the water quality regulation when the MDE had not determined the underlying facts regarding that issue and had not applied the regulation when it determined to grant the modified permit?
2. Does the MDE's decision to issue the modified permit conflict with the clean water laws and thus constitute an abuse of the limited discretion delegated to the MDE?
    a. Does the MDE's interpretation of ambient temperature to permit effluent-filled or distant waters to be used as the water quality standard for the Piney Run contravene both the Clean Water Act and its own regulations?
    b. Did the MDE abuse its discretion by interpreting the water quality standards to permit an effluent temperature that violates the Plant's permit?

We answer "yes, on the particular facts of this case," to question one[1] and remand the case to the MDE. Given our means of resolving the first question, we need not decide either part of question two.

REGULATORY BACKGROUND

The Federal Water Pollution Control Act (also known as the Clean Water Act), 33 U.S.C. §§ 1251–1387 (1994), prohibits the discharge of pollutants into the waters of the United States unless the U.S. Environmental Protection Agency (EPA) has issued an NPDES permit to the discharger. 33 U.S.C. § 1342(a). The EPA will suspend its own licensing program in a state provided that the state program meets certain requirements. 33 U.S.C. § 1342(b), (c). Maryland meets those requirements and, accordingly, it issues NPDES permits for discharges into Maryland waters. The MDE is responsible for administering the State's permit program. See Md. Code (1982, 1996 Repl. Vol.), §§ 9-322, 9-323 of the Environment Article ("EN").

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[1] We phrase our answer to question one in this fashion because the key element of this case, as we explain infra, is that the MDE never determined, at any point during the entire permit-issuing process, the underlying facts necessary for a proper application of the stream's temperature regulation. Not only did the MDE fail to determine the necessary facts initially in 1993 when it decided to issue the permit, neither did it do so at the contested case hearing before the ALJ.

Under EN § 9-324:

> (a) In general. – Subject to the provisions of this section, the [Maryland] Department [of the Environment] may issue a discharge permit if the Department finds that the discharge meets:
>
> (1) All applicable State and federal water quality standards and effluent limitations; and
>
> (2) All other requirements of this subtitle.

Similarly, the Code of Maryland Regulations (COMAR), Md. Regs. Code tit. 26, § 26.08.04.02 [hereinafter COMAR], states in part:

> Requirements for the Issuance and Reissuance of Discharge Permits.
>
> A. General. The Department shall issue or reissue a discharge permit upon a determination that:
>
> (1) The discharge or proposed discharge specified in the application is or will be in compliance with all applicable requirements of:
>
> (a) Effluent limitations,
>
> (b) Surface and ground water quality standards,
>
> (c) The Federal Act,

(d) State law or regulation,
(e) Best available technology, and
(f) Federal effluent guidelines.

The MDE is authorized to adopt regulations to set water quality standards[2] and effluent limitations[3] for waters within the State. EN § 9-314(a). The MDE has adopted surface water quality standards to protect public health or welfare, to enhance water quality, to protect aquatic resources, and to serve the purposes of the Clean Water Act. COMAR 26.08.02.01A.

The surface water quality standards consist of (1) designated uses and (2) water quality criteria to protect those designated uses. COMAR 26.08.02.01B. To achieve the goals of the water quality standards, a body of water is classified by a "designated use" and then is protected by a specific set of water quality criteria. The stringency of the criteria depends on the type of designated use to be maintained. One of the water quality criteria for the Piney Run's "Use III-P" classification (natural trout water and public water supply) is the following:

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[2] Water quality standards "specify the maximum permissible short term and long term concentrations of pollutants in the water, the minimum permissible concentrations of dissolved oxygen and other desirable matter in the water, and the temperature range for the water." EN § 9-314(b)(1).

[3] Effluent standards "specify the maximum loading or concentrations and the physical, thermal, chemical, biological, and radioactive properties of wastes that may be discharged into the waters of this State." EN § 9-314(b)(2).

Temperature.

(a) The maximum temperature outside the mixing zone[4] . . . may not exceed 68? F[ahrenheit] (20? C[elsius]) or the ambient temperature of the surface waters, whichever is greater.

(b) A thermal barrier that adversely affects aquatic life may not be established.

COMAR 26.08.02.03-3D(3). At issue here is the interpretation and application of paragraph (a), which, for convenience, we shall call the "thermal criterion."

FACTS

I. The MDE's Determination to Issue the Proposed Permit

Following the County's 1991 application for a permit modification to increase the flow of the Plant's wastewater discharge, the MDE published notice of the requested modification and held a public hearing.

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4 A "mixing zone" is

> an area contiguous to a discharge where surface water quality or ground water quality does not have to meet:
>
> (a) All water quality criteria; or
> (b) (b) All requirements otherwise applicable to the natural water.

COMAR 26.08.01.01B(44).

Comments received on the proposal were addressed in the MDE's Notice of Final Determination. In the Notice, the MDE summarized its decision to issue the modified permit by stating

> The Department's evaluation indicates that the discharge, as limited by the proposed stringent effluent requirements . . . , will not cause violations of water quality standards in Piney Run. Water quality conditions in Piney Run, above and below the [Plant's] discharge, were used to establish the proposed discharge permit parameters.[5]

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5 The only explicit mention of temperature in the Notice of Final Determination was the following statement made in response to one of the comments received by the MDE:

> Comment
> Concerns were expressed over increases in temperature in the concrete channel of Piney Run at the [Plant].
>
> Determination
> Measurements of temperature changes along the channel indicated a significant rise in temperature is not occurring.

(The concrete channel, which extends downstream from the Plant, is not part of the treatment plant. It was installed as a flood control measure, according to the testimony of one of the MDE's experts at the hearing before the ALJ.)

The modified permit itself did not contain any specific temperature limitation, nor did it contain a statement that the thermal criterion in COMAR 26.08.02.03-3D would be met..

II. The Hearing before the ALJ

The Landowners presented the expert testimony of Edward J. Bouwer, Ph.D., Professor of Engineering, Department of Geography and Environmental Engineering at Johns Hopkins University. A portion of Dr. Bouwer's testimony consisted of his interpretation of a 1993 temperature study conducted by the MDE. In this study, the MDE made temperature recordings on six days at four stations along the Piney Run in the area of the Plant: Station 1 was located upstream from the point of effluent discharge; Station 2 was located at the source of the discharge and measured the temperature of the effluent; Station 3 was located about 60 feet downstream from the effluent source; and Station 4 was located about 485 feet downstream from the effluent source.[6]

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[6] The following table summarizes the results of the study: Temperature Measurements (in degrees Celsius) in 1993

Station	Jul 15	Jul 16	Jul 19	Jul 21	Jul 28	Aug 9
1 pre-effluent Piney Run Temp.	20.0	20.0	18.0	18.5	23.5	20.3
2 effluent temp.	21.5	21.0	20.0	21.0	22.7	21.1
3 60 ft. post-effluent Piney Run temp.	21.5	21.5	19.1	21.0	23.5	21.8
4 485 ft. post-effluent Piney Run temp.	22.0	22.0	19.9	21.0	24.5	24.1

Dr. Bouwer told the ALJ, "The upstream [pre-effluent] portion of Piney Run is coming in, and this [Station 1] is what I interpret to be the ambient surface water temperature."[7] Based upon his opinion that Station 1 provided the correct measure of ambient temperature, Dr. Bouwer stated, "Because the treatment plant effluent [Station 2] is warmer than this water flowing upstream from Piney Run [Station 1], then when it mixes with the water down here [at Station 3] . . . , the water will be warmer." The downstream temperature was higher, relative to Dr. Bouwer's calculation of ambient temperature, which indicated to him that there was a violation of the thermal criterion at the current discharge level.[8] By increasing the amount of effluent from 0.5 mgd to 0.9

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[7] On rebuttal, Dr. Bouwer testified that the meaning of "ambient temperature" is, for the region in question, "[the temperature] in the absence of any input, any wastewater input to the stream."

[8] Moreover, under a condition called the "seven-day, ten-year low flow," the "temperature violation would be even more severe than what is shown by the measurements that are made here [if these measurements were not made during the low-flow condition]."

The seven-day, ten-year low flow (the "$Q_{7\text{-}10}$") represents the most conservative estimate of a stream's flow, i.e., under drought conditions or the "worst-case scenario" for aquatic life. At the point of discharge, an effluent release of 0.5 mgd would represent 93% of the Piney Run's flow during the $Q_{7\text{-}10}$; a 0.9 mgd release would represent 96% of the stream's flow under the $Q_{7\text{-}10}$ condition. According to Dr. Bouwer, the almost complete domination of the stream by the effluent during the low-flow period would cause an even greater increase in the temperature of the stream because the lack of pre-effluent water, i.e., cooler water, would result in less dissolution of the warmer effluent.

mgd, Dr. Bouwer explained, "[Y]ou're putting more heat into the river [sic] and getting less dissolution, and that heat will be carried further down and would elevate the temperature downstream."[9]

On cross-examination, Dr. Bouwer was asked what would happen to the detention time of the wastewater traveling through the Plant if the Plant flow increased to 0.9 mgd. He replied that the wastewater detention time in the Plant would decrease. Following his answer, the MDE's counsel asked what result the decrease in detention time would have on the temperature of the outgoing water (i.e., the treated

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[9] On rebuttal, the Landowners' counsel posed a hypothetical to Dr. Bouwer. As opposed to the upstream, pre-effluent water being the measure of ambient temperature, Dr. Bouwer was asked to assume (1) that the ambient temperature of the Piney Run was the temperature of the stream as it existed in 1975 when the treatment plant was discharging approximately 0.2 mgd of effluent into the stream and (2) that all other variables remained constant. In response to the question of what would happen to the temperature of the stream if the effluent volume were increased, Dr. Bouwer replied:

> As you increase the [effluent] flow [to 0.5 mgd or to 0.9 mgd], you increase the temperature. It remains the same as the flow is. You're essentially increasing the amount of thermal pollution to the water.
>
> There's less [diss]olution, because you have more flow from the treatment plant, and it's an elevated temperature relative to the upstream flow that is a constant seven day, ten year low flow as a constant value. And if you increase . . . [from 0.2 mgd to 0.5 mgd or to 0.9 mgd], then that represents the increase in the thermal pollution in the stream which would elevate the temperature.

effluent). Dr. Bouwer testified that "there won't be as much warming of the [outgoing] water." (Emphasis added.)

Although the MDE argued at the hearing before the ALJ that the temperature limit in the Use III-P water quality criteria did not apply to wastewater treatment plants, in the alternative, it argued that even if the thermal criterion did apply, "there would be no violation."

The MDE presented the expert testimony of Mary Jo Garreis, Administrator of Water Quality Programs in the MDE's Water Management Administration. Ms. Garreis testified that "we really don't have a good consistent detailed kind of temperature record on the stream that we would really like to see" and that to get good temperature data might require measurements to be taken over several years. The lack of temperature data, however, was not crucial to Ms. Garreis' application of the water quality standards to the Piney Run.

Ms. Garreis testified, "[W]hen we apply the water quality standards and when we attempt to do the permits, we look very hard at what are those existing uses that have to be protected." According to Ms. Garreis, the loss of the "existing uses," i.e., the uses that existed after November 27, 1975, is not permitted under COMAR.[10]

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[10] Ms. Garreis explained that "use designation" is a "goal for the stream to meet," as opposed to the "existing use," and "[i]n some cases, the existing use and designated use are identical and in other cases the existing use may be better or lesser than the designated use." Under COMAR 26.08.01.01B(31), "existing uses" means "those uses actually attained in the water body after November 27, 1975, whether or not the uses are included in the water quality standards."

In this case, according to Ms. Garreis, the existing use is comprised of: (1) the presence of trout in the stream's Trenton Mill area, which is located approximately two miles downstream from the Plant; and (2) an absence of trout in the area between Trenton Mill and the Plant. Given that Trenton Mill historically has been the location of trout, Ms. Garreis stated, "[W]e want to make sure that the trout population down here at Trenton Mill remains protected and continue[s], hopefully, to even get better than it already is."

In 1973, a Department of Natural Resources (DNR) biologist noted one adult brown trout in the Trenton Mill area of the Piney Run. Ms. Garreis said:

> W]hen we have a condition that is like this here, we generally acknowledge that condition and try not to let it [a]ffect that condition anywhere beyond the historical boundaries of it.
>
> So, in this particular case, since the trout population down at Trenton Mill Road is existing, we would not let anything happen here that would adversely [a]ffect that population. That would be the boundary of what we would try to control.

Ms. Garreis testified that the trout population increased between 1973 and 1993 to nine[11] and, therefore, the existing discharge of 0.5

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[11] In 1993, 20 years after the sighting of one adult brown trout at Trenton Mill, a DNR biologist found nine adult brown trout of multiple year classes at that location.

mgd of effluent was not inhibiting trout propagation.[12] Ms. Garreis opined that an increase in effluent flow as proposed by the County would not have an adverse effect on the trout at Trenton Mill.

On cross-examination, Ms. Garreis conceded that, in a small stream, if the effluent flow increased, and all other conditions remained the same, the temperature just a few feet downstream is going to be "a little bit" higher.

The following exchange took place on re-direct examination:

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12 The following colloquy took place:

> [APPELLEE'S COUNSEL]
>
> Q. What do fish or trout surveys indicate regarding the ambient temperature of Piney Run?
>
> [MS. GARREIS]
>
> A. Well, what it suggests to me is that the trout population where it exists is flourishing. So, therefore, whatever those ambient temperatures are, the trout are happy with them it [sic].
>
> It also indicates since we continued to find the habitat that is considered good to excellent for young of year [trout] between this Trenton Mill site that continues to be documented, it indicates to me that we are maintaining what was existing in that stream. And the surrounding population down at the Trenton Mill even suggest[s] it's getting a little better.
>
> Q. And what effect does the discharge from the Hampstead plant have on that?
>
> A. It would appear from the available information that the existing discharge is not interfering in any way with the existing trout populations as [sic] and the habitat as they were configured originally in 1975.

[APPELLEE'S COUNSEL]

Q. Given the biological information that you have been given on Piney Run and given that the temperature regulation states that the temperature should be 20 degrees centigrade or ambient temperature, whichever is higher, was it necessary to get additional actual temperature measurements before issuing the discharge permit?

[MS. GARREIS]

A. No, it's not necessary. Historically we have done it in the absence of data.

Q. Do you have the data on the ambient conditions for the trout?

A. Yes.

Q. And is that sufficient?

A. That is sufficient in that it tells us what the stream and what the animals in the stream are comfortable with.

Q. And the trout and the supporting organisms for the naturally reproducing trout population are an indicator of the ambient temperature of the stream?

A. The presence of a healthy biological population, what you call the companion animals or the supporting animals for trout are present[,] and that is an indication of acceptable temperature.

Ms. Garreis did not interpret the MDE's 1993 temperature study, see supra note 6, except to say, in her direct testimony, that

> ambient means local or surrounding. Ambient is the condition for this stream as the original use designation was construed [as of 1975].
>
> So, it is my opinion that [at the end of the concrete channel][13] is where the ambient temperature for Piney Run should be determined because this is the given condition in this stream. The use designation, the existing trout population as it was documented in 1973 is, again, depending on whose figures you use, 1.8 to 2 miles, downstream at th[e] Trenton Mill location . . . .
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> * * *

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13 There is some confusion as to whether Ms. Garreis intended to indicate the 1993 temperature survey's Station 3 or Station 4. On appeal, both the Landowners and the MDE state that Ms. Garreis testified that "the end of the concrete channel" was the appropriate place to measure ambient temperature in this case and, in their briefs to this Court, both parties refer to "the end of the concrete channel" as Station 3. However, if Ms. Garreis intended that the ambient temperature should be measured at the termination of the concrete channel, this location corresponded to Station 4, according both to Dr. Bouwer's testimony and to the MDE memorandum summarizing the results from the 1993 temperature study. When she mentioned the temperature study in her testimony, Ms. Garreis sometimes referred to the station numbers by an alternate numbering system. When referring to the "end of that concrete apron," Ms. Garreis noted its location at number "PIU0082," which corresponded to Station 4. Later she said that the end of the concrete apron was at "83." The designation "83," presumably a shorthand for PIU0083, was located at Station 3.

> So, I would argue that for the application of this regulation, the appropriate determination of the ambient [temperature] is here at the end of the concrete channel condition. And it recognizes the conditions of the [P]lant [i.e., that the Plant was discharging effluent at the time the use designation was assigned to the stream in 1974 and at the time of the "existing use" baseline date in 1975], the contribution of the storm drain, the condition of the concrete channel, and it also recognizes that the trout population as it existed [and] continues to exist at Trenton Mill.

The ALJ agreed with the MDE that the thermal criterion was inapplicable to wastewater treatment plants, but even if it were applicable, the Landowners bore the burden of proving, under COMAR 26.01.02.28B(2),[14] that the requested permit modification

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[14] This section of COMAR states:

> **.28 Burdens of Going Forward and Persuasion.**
>
> A. When by specific statute or regulation the burden of going forward or the burden of persuasion rests upon a certain party, this regulation does not shift those burdens.
>
> B. Except as provided in §A, above:
>
> * * *
>
> (2) A party contesting the Department's intent to issue or renew a permit or license bears the burden of going forward to establish a prima facie case that grounds exist for denying the license or permit and the burden of persuasion that the license or permit is to be denied.

should be denied. The ALJ's holding that the Landowners did not meet their burden of proof was founded upon the Landowners' failure to prove that, in this case, ambient temperature should be measured in the water upstream from the Plant. Therefore, the ALJ perceived that Dr. Bouwer's testimony regarding existing and future violations, which was based on a measurement of ambient temperature at this location, lacked substance.[15]

III. The Agency's Final Decision and Order

The FDM held that, although the Plant was subject to the thermal criterion,[16] the Landowners had not proven that the discharge violated the temperature limit for the stream. In the words of the FDM, "The uncontroverted evidence shows that at certain times during the year the stream temperature exceeded 20?C. However, in order to prove a temperature violation, the [Landowners] must prove that the temperature exceeded the ambient temperature of the stream."

The FDM held that Dr. Bouwer had not supported his determination that the ambient temperature of the stream must be measured at a

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15 The ALJ also believed that Dr. Bouwer undermined his testimony that more severe temperature violations would ensue with an increase in effluent discharge because he "admitted that the temperature of [the Plant's] effluent would be lower at a discharge rate of [0].9 mgd because the time that the wastewater spent in the [P]lant would be reduced, and less natural warming would take place." The ALJ concluded that, based on this testimony, "it seems more likely than not that there is less chance of a temperature violation in the future."

16 This holding was not challenged subsequently by the MDE in the Landowners' appeal to the circuit court.

location upstream from the point of effluent discharge. The classification of the Piney Run as a trout stream required that "conditions remain to protect the trout population." Because two years after the Plant began discharging effluent, trout existed at Trenton Mill, i.e., downstream from the Plant, "temperatures at that time were supportive of the trout population." Based on the sighting of one trout in 1973 in the Piney Run waters that contained effluent, the FDM concluded that the ambient temperature did not have to be measured at a point that excluded effluent.

The FDM was not persuaded by Dr. Bouwer's assertion that a temperature violation existed at the current discharge level. The FDM was also unpersuaded by the Landowners' argument that the addition of another 0.4 mgd (for a total of 0.9 mgd) of effluent to the Piney Run would create a temperature violation because the FDM believed that "less natural warming" of the effluent would occur with an increase in effluent volume.

The FDM noted that, despite the absence of trout from the nearly two-mile stretch downstream from the Plant, "[t]here has been no evidence presented to indicate that the discharge from [the Plant] has caused this absence of trout." Moreover, there are data to suggest that this region of the river historically has not supported a trout population. According to the FDM, "It is apparent that the section of stream from the [Plant] to Trenton Mill has not had an adverse [e]ffect upon the trout population. To the contrary, the trout population has flourished in light of an increase in discharge from 200,000 gallons per day to 500,000 gallons per day."

IV. Appellate Review by the Circuit Court

The circuit court held that (1) "the determinative question to be answered underlying th[e] [Landowners'] contention is exactly how, when and where the 'ambient temperature' of Piney Run is to be properly measured," and (2) this issue is a question of fact, to be determined on a case-by-case basis. The circuit court also held that because the Landowners did not provide sufficient evidence to support their calculation of the Piney Run's ambient temperature there was insufficient evidence to prove a current or future violation of the thermal criterion.[17]

STANDARD OF REVIEW

In an appeal from the circuit court of an administrative agency's order, we conduct the same review the trial court did, i.e., we review the agency's decision itself. Department of Educ. v. Shoop, 119 Md. App. 181, cert. denied, 349 Md. 495 (1998); State Bd. of Architects v. Clark, 114 Md. App. 247, 250 (1997) (citing Department of Health and Mental Hygiene v. Shrieves, 100 Md. App. 283, 303-04 (1994)); Northwest Land Corp. v. Department of the Env't, 104 Md. App. 471, 488, cert. denied, 307 Md. 260 (1995). Although we apply a limited scope of review to an agency's factual findings, i.e., a finding of fact will be reversed only if it is not supported by substantial evidence, we review questions

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[17] Although the trial court was unpersuaded by the trout population sightings because of the "sheer paucity of fish that comprise this evidence," the court found that the ALJ "was presented with, and based his decision on competent evidence, based in large part on his belief that it could not be stated with assurance that the discharge from the [Plant] was the basis for any temperature violation."

of law de novo. See Clark, 114 Md. App. at 251; Citizens for Rewastico Creek v. Commissioners of Hebron, 67 Md. App. 466, 470, cert. denied, 307 Md. 260 (1986).

ANALYSIS

As their threshold argument, the Landowners contend that the MDE made no findings regarding the ambient temperature of the Piney Run prior to determining that it would issue the modified permit to the County. According to the Landowners, "MDE did not apply its regulation when it processed the County's application: the record shows no reliance by MDE on an ambient temperature reading in Piney Run." The Landowners argue that, under EN § 9-324(a)(1), the MDE "must ensure that the discharge meets all applicable state and federal water quality standards." The temperature limit at issue in this case is part of the applicable water quality criteria that the proposed discharge must be able to meet before a discharge permit can be issued.

To show that the temperature limit is met, the Landowners argue that the MDE must "make specific findings: the location at which to measure the 'ambient temperature,' the temperature there in degrees Celsius or Fahrenheit, and the temperature of the water outside any mixing zone provided for the Plant." The Landowners point out that the "MDE has never quantified the ambient temperature for Piney Run." The Landowners also note that neither the ALJ nor the FDM made any findings of fact quantifying the Piney Run's ambient temperature.

Although the MDE claims that the FDM made findings on the ambient temperature of the stream, the MDE's main contention is that

> [a]ppellants' argument reflects their continued error about who bore the burden in this case. As [the ALJ] correctly found, it is [a]ppellants who bore the burden, and yet [a]ppellants complain that MDE "failed to demonstrate" that the stream would be protected. It is [a]ppellants who failed to produce evidence that the modified [p]ermit does not satisfy water quality standards.[18]

(Citations omitted.) In support of this contention, the MDE cites COMAR 26.01.02.28B(2)[19] and Northwest Land Corp., supra, 104 Md. App. 471, 494. According to the MDE, the Landowners did not meet their burden because (1) they failed to show a current violation, and (2) given that there was no proof of a current violation

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18 Despite maintaining in its brief that the burden of proof in this case was on the Landowners, in the Prehearing Statement the MDE made to the ALJ, which was quoted in the Landowners' counsel's opening statement at the hearing, the MDE had acknowledged its administrative responsibilities:

> In preparing [a] discharge permit, the Department must turn to the regulations, determine the applicable water quality standards and then must determine the quality and quantity of [pollutants] that may be discharged into a stream without causing the stream to exceed its water quality standards.

(Alterations show sentence as it appeared in the Prehearing Statement.)

19 As we quoted, supra, this paragraph states, "A party contesting the Department's intent to issue or renew a permit or license bears the burden of going forward to establish a prima facie case that grounds exist for denying the license or permit and the burden of persuasion that the license or permit is to be denied."

and because an "increase in flow per se will not cause a temperature increase," they could not, therefore, show a future violation.

The Landowners counter that it was not their burden to prove that a violation of the thermal criterion would occur if the Plant is allowed to increase its effluent discharge. The Landowners assert that "[u]nder the circumstances presented by this case, the lower court erred in finding that the Landowners bore the burden of proving issues and facts that MDE had not considered and concluded." (Emphasis added.) Lastly, the Landowners argue that the rule is not that the County is "entitled to the issuance of a permit unless proven otherwise." We agree with the Landowners.

We disagree with the MDE's postulations that the FDM "made the finding that, as indicated by the growing trout population, the ambient temperature of the Piney Run was not exceeded by the discharge" or that the FDM "properly found that the biological assessments finding the presence of cold water organisms in the Piney Run indicated that its ambient temperature was not exceeded by the discharge from the Hampstead Plant."[20] (Emphasis added in both quotes.) The FDM made neither of these findings.

The FDM merely stated that, given the Landowners' burden of proof, there was insufficient evidence to conclude that the ambient temperature of the Piney Run should be measured upstream from the Plant. The FDM was unconvinced as to the validity of

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[20] The MDE does not provide information as to which biological assessments it is referring. Because Ms. Garreis did not testify to any biological assessments besides the 1973 and 1993 sightings of trout, we are left to assume that the phrase "cold water organisms" refers to "trout."

the Landowners' conclusion that there was a temperature violation at the present flow of effluent. The FDM's statement regarding the stream's "flourishing" trout population only conveyed his belief that the expansion of the trout population from one to nine fish controverts the Landowners' assertion that the Plant's effluent is adversely affecting the trout population. Moreover, even if the FDM made the findings that the MDE claims were made, we hold that, in this case, the health vel non of the trout population cannot be used as a gauge to measure ambient temperature.

Neither the Code nor COMAR provides any indication as to how to measure "ambient temperature," as the phrase is used in COMAR 26.08.02.03-3D(3)(a).

The interpretation of an agency regulation is "'governed by the same principles that govern the interpretation of a statute.'" Clark, 114 Md. at 258 (quoting Maryland Comm'n on Human Relations v. Bethlehem Steel Corp., 295 Md. 586, 593 (1983)). Therefore, the goal is to ascertain the intent of the agency in promulgating the regulation, and the plain meaning of the regulation's language is the key to determining agency intent. See Montgomery County v. Buckman, 333 Md. 516, 523 (1994). In interpreting the language of a regulation, "no word, clause, sentence or phrase should be rendered surplusage, superfluous, meaningless, or nugatory." Maryland Port Admin. v. John W. Brawner Contracting Co., 303 Md. 44, 60 (1985). This cardinal rule overrides any deference that ordinarily would be accorded to an agency's interpretation of its own regulation.

The MDE appears to hold the view that temperature per se need not be measured so long as trout survive. The MDE posits, "The available data on the Piney Run, including the chemical and physical data, data on other trout streams, and biological assessments, were consistent with the finding of an increasing trout population." (Emphasis added.) Moreover, the MDE suggests that, if all else is constant, a change in the volume of effluent will not affect a stream's temperature and that, because the trout are not adversely affected by the current discharge level, they will not be harmed by an increase in effluent flow.[21]

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[21] Insofar as the opinion that the trout are not adversely affected by the current discharge level is based on the evidence in the record comparing the numbers of trout found in the Trenton Mill area in 1973 and in 1993, this conclusion is flawed. Merely because there has been an increase in the number of trout based on two measurements taken 20 years apart while the Plant has been discharging effluent and, at one point during that time, has increased the flow of effluent, one cannot say that the effluent has had no adverse effect (or has had a beneficial effect) on the trout population. Even if the increase from one to nine fish was statistically significant, a correlation cannot be inferred simply because an increase was noted in the numbers of trout in effluent-containing waters in the same general time frame when an increase in the volume of effluent flow also occurred.

The nine trout sighted in 1993 may have represented a decrease in the trout population existing up until 1984, for example, when the Plant's discharge of effluent increased in flow from 0.2 mgd to 0.5 mgd. Data on the numbers of trout at Trenton Mill were not gathered after the initial assessment in 1973 but prior to the effluent increase in 1984. These data are necessary (but perhaps not sufficient, though) to make a determination about the size of the trout population and its relationship to the volume of effluent in the Piney Run waters. Moreover, even if a correlation between the presence of effluent and the number of fish could be found, a causal relationship still cannot be inferred. Many other variables would have to be examined before such a conclusion could be drawn.

(Emphasis added.) The MDE also refers to a lack of evidence that "the ambient temperature acceptable for the growth and propagation of trout will be exceeded by the proposed discharge." (Emphasis added.)

We do not dispute the obvious fact that the trout population in the Piney Run must be protected. The issue of protecting "existing uses," however, does not negate the command in COMAR 26.08.02.03-3D(3)(a) that the discharge of effluent cannot raise the temperature of the stream outside the mixing zone above the higher of 20? Celsius or the ambient temperature of the surface waters. In fact, the temperature limit, as part of the water quality criteria, is the method chosen to ensure that the stream's use designation is protected. Attempting to maintain existing uses without addressing any temperature change in the stream that results, or will result, from the Plant's discharge would render the term "temperature" meaningless and the entire thermal criterion nugatory.

The thermal criterion we have been discussing is accompanied by another water quality criterion dealing with temperature. COMAR 26.08.02.03-3D(3)(b) states that a "thermal barrier that adversely affects aquatic life may not be established." A "thermal barrier" is a "pattern of artificially created temperature change and distribution." COMAR 26.08.01.01B(91). By solely being concerned with any adverse effect the Plant's effluent would have on the trout, it appears that the MDE is interpreting paragraph (a), the "thermal criterion," in such a way that it has the same meaning as paragraph (b), thus causing the thermal criterion to become superfluous. These paragraphs represent separate requirements that must be met independently; paragraph (a) cannot be subsumed in paragraph (b).

The types of evidence presented by the MDE's Ms. Garreis that bear relationship to "temperature" are exemplified by three points in her testimony – point one: that she would "argue" that ambient temperature should be measured at the end of the concrete channel; point two: that, so long as there is evidence that the stream's existing uses (i.e., the trout population in the region of Trenton Mill) are being maintained, no additional temperature data are needed; and point three: that data on the trout population at Trenton Mill can be used as an indication of "acceptable temperature."

A measure of ambient temperature, which is a numerically quantifiable figure, cannot be gleaned from such evidence. Regarding point one, the MDE acknowledges that neither the ALJ nor the FDM adopted Ms. Garreis' opinion of the appropriate location to measure ambient temperature, i.e., at the end of the concrete channel. The FDM merely found that ambient temperature did not have to be measured at a point that excluded effluent. Moreover, the MDE presented no analysis comparing the temperature at the "end of the concrete channel" with the temperature outside of the mixing zone. Regarding point two, as we explained supra, merely asserting that the existing uses are protected is insufficient, given the plain language of COMAR 26.08.02.03-3D(3)(a).

Regarding point three, even if the MDE is correct in its argument that "biological data provide[] the best indicator of whether the ambient temperature of the Piney Run is being maintained," trout cannot be used in lieu of an actual temperature measurement in the instant case. If one of the goals of the use

designation for the Piney Run is to protect the stream's trout population, it makes no sense to use the fauna as guinea pigs to determine if the stream's temperature is higher than ambient. If trout were to be used as a make-shift "thermometer," then would the MDE determine that the stream's ambient temperature was not being maintained only if they saw trout floating belly-up down the Piney Run? This would be like dipping a baby into bath water to determine if the water is too hot. By the time the test is complete, the damage is already done. Ambient temperature cannot be defined as whatever temperature the trout can survive in.

The basic problem with the MDE's approach is that there is no reference point from which to conclude either that the thermal criterion was or was not being violated with the current level of effluent. If there was substantial evidence that an increase in flow reduces the temperature of the effluent because the effluent experiences less natural warming in the Plant, not knowing the baseline ambient temperature prevents a conclusion such as the one made by the ALJ, see supra note 15, that a decrease in effluent temperature would result in the discharge meeting the requirement of the thermal criterion. Conversely, given the possibility of "less natural warming" with an increase in flow, the "no problem now, and therefore none in the future" rationale might be acceptable if there was an assessment, in quantifiable terms, showing that the regulation was met at the current level of discharge.

Another related problem is that the burden of proof was placed on the Landowners at a time when there was no evidence in the record that: (1) the MDE, in making the determination to issue the permit, (a)

applied the agency's thermal criterion, and (b) found that the temperature limit would be met with the proposed discharge; or (2) the MDE provided sufficient information at the hearing before the ALJ so that subsequent to that hearing the FDM could conclude that, by the time of the administrative hearing, the MDE had completed both (a) and (b). It is illogical to hold (as the circuit court did) that a permit properly can be granted without being able to conclude (as the circuit court could not) that the agency performed its administrative function when arriving eat the decision, whether at the stage of the MDE's initial determination, or upon the FDM's directive, to issue the permit. To compel the Landowners to shoulder the burden of proof under COMAR 26.01.02.28B(2) to prove that the permit should not be issued is, on the facts of this case, beyond reason. The legislature placed certain restrictions on the MDE's authority to administer the permit program. One of these restrictions requires the MDE to find that the discharge meets the relevant water quality criteria in order to issue a discharge permit. See EN § 9-324. The agency cannot avoid the duty of applying its temperature regulation in the first instance by shifting the responsibility to the Landowners to prove where the ambient temperature of the Piney Run should be measured.

In the case at hand, the MDE had to show that its decision to issue a discharge permit to the County was made in accordance with EN § 9-324, i.e., that it had made a finding that the water quality standard at issue in this case, the thermal criterion, was

met.[22] Given the fact that this finding was not made initially, that is, in 1993 when the MDE's determination was made to issue the permit, then it was up to the agency to present information to the ALJ during the contested case hearing to show that the Plant's proposed discharge would meet the thermal criterion. The MDE made no such showing. Under such circumstances, the FDM should have remanded the case to the MDE for a determination of the material facts on this issue.[23]

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[22] When we say "make a finding," we are not shifting the burden of proof under COMAR 26.01.02.28B(2) to the agency. Rather, we are saying that the agency must be able to articulate the result of its application of its thermal criterion, i.e., where the ambient temperature of the stream was measured, what the measurement was, and whether the temperature of the stream will be in accord with the regulation's temperature limit if the requested discharge is permitted. If the agency makes such an articulation, then the burden will be on the challenging party to prove that the agency erred in its calculation and conclusion. The bottom line is that, unless the agency can demonstrate at the hearing that it applied its own regulation to satisfy EN § 9-324, the challengers' burden at the hearing under COMAR 26.01.02.28B(2) does not come into play.

[23] The MDE cites Northwest Land Corp., supra, 104 Md. App. at 494, for the proposition that "[t]o require MDE to perform an additional temperature survey before issuing a discharge permit would be duplicative as well as burdensome on the NPDES permit process." The MDE's reliance on Northwest Land Corp. is misplaced. In that case, the MDE had made the necessary assessment at issue. Here, requiring the MDE to make a required temperature assessment because it failed to have made one cannot be considered duplicative.

CONCLUSION

The FDM erred in upholding the ALJ's determination that, because the Landowners had not met their burden to show that the discharge would result in a temperature violation, the MDE's decision to issue the permit should be affirmed. Because the FDM found that the thermal criterion applied to wastewater treatment plants, the FDM needed to have made a finding that the MDE determined that the discharge met the thermal criterion, pursuant to the command in EN § 9-324 in order to have affirmed the ALJ's placement of the burden of proof on the Landowners under COMAR 26.01.02.28B(2). The FDM, however, affirmed the granting of the permit and only found that there was not enough evidence that the thermal criteria was not met. This finding is insufficient to satisfy the agency's authority as governed by EN § 9-324. With agency action (i.e., the issuing of a discharge permit) in the face of an absence of findings on material issues of fact, we ordinarily would remand the case to the FDM to make the relevant findings.[24] Because of the paucity of

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[24] We would do so because, in addition to the agency's skirting of EN § 9-324's requirement, the FDM's issuance of the permit without making findings of fact on the temperature issue was violative of the command of the Administrative Procedure Act (the "APA"), Md. Code (1995 Repl. Vol., 1997 Cum. Supp.), §§ 10-101 through 10-1001 of the State Government Article. The case law interpreting the Act provides a well-settled directive that, in reaching a final decision and effecting an order, agencies must make findings of fact on all material issues and state the rationale behind their action. For example, in United Steelworkers of America AFL-CIO v. Bethlehem Steel Corp., 298 Md. 665 (1984), the Court of Appeals noted that

> ["]it is appropriate to point out, as we have in previous opinions, not only the importance but the necessity that administrative agencies resolve all significant conflicts in the evidence and then chronicle, in the record, full, complete and detailed findings of fact and conclusions of law. Indeed, this is mandated by Code (1957, 1971 Repl.Vol.) Art. 41, § 254).["]

United Steelworkers, 298 Md. at 678-79 (quoting State Comm'n on Human Relations v. Malakoff, 273 Md. 214, 229 (1974)); see also Forman v. Motor Vehicle Admin., 332 Md. 201, 220-21 (1993); accord Sweeney v. Montgomery County, 107 Md. App. 187, 196-98 (1995) (under the Montgomery County Code).

The section of the Maryland Code cited, supra, in United Steelworkers is found under the APA in § 10-221 of the State Government Article. Section 10-221(b) states, in part:

> Contents.—(1) A final decision or order in a contested case . . . shall contain separate statements of: (i) the findings of fact; (ii) the conclusions of law; and (iii) the order.

Two of the cornerstones for the "findings" directive are (1) to provide courts with the ability to conduct a proper review of an agency's decision, and (2) to honor the losing party's right to know why he or she lost. B. Schwartz, Administrative Law § 140, at 417-18 (1976).

Regarding the first rationale, the scope of review of a decision made by an agency has been described as follows:

> Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

relevant evidence here, it would be meaningless to remand the case to the FDM. We vacate the Final Decision and Order of the FDM and remand the case to the agency to determine: (1) with respect to the Plant and its discharge of effluent, where to measure ambient

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United Steelworkers, 298 Md. at 679 (emphasis added). As explained by the Court of Appeals in Forman, 332 Md. at 220, "In order to apply the appropriate standard of review . . . , the reviewing court must first know how and why the agency reached its decision. It must know what it is reviewing." In other words, "[w]ithout findings of fact on all material issues, and without a clear statement of the rationale behind the [agency's] action, a reviewing court cannot properly perform its function." Id. at 221.

The final decision of the agency in this case is merely a hollow shell: we could not affirm (or reverse) because there are insufficient findings on the thermal criterion upon which we could apply the substantial evidence standard of review. "A reviewing court may not make its own findings of fact, Board of County Comm'rs v. Holbrook, 314 Md. 210, 218 (1988), or supply factual findings that were not made by the agency. Ocean Hideaway Condo[minium] Ass'n v. Boardwalk Plaza [Venture], 68 Md. App. 650, 662 (1986)." Department of Educ. v. Shoop, 119 Md. App. 181, 196, cert. denied, 349 Md. 495 (1998). Nor can we determine the inferences to be made from the facts; that is also the job of the agency. Id.

In addition to facilitating judicial review, "[t]he requirement of [making] findings meets the elementary demand of those injured by an agency decision to be told 'the reason why.' Findings serve as an explanation to the parties as to the basis for the decision." B. Schwartz, Administrative Law § 140, at 417 (1976) (footnote omitted). Based on the FDM's decision, the Landowners, as well as the reviewing courts, do not know to this day how the agency would apply the thermal criterion to the Piney Run in the context of this case, that is, in terms of where the agency would measure the ambient temperature of the stream, what the ambient temperature is, and whether, based on these findings, the proposed discharge would meet the temperature limit in the thermal criterion.

temperature of the Piney Run; (2) what the ambient temperature measurement is in this case; (3) whether, at the current level of discharge, the temperature outside the mixing zone exceeds 20? Celsius or the ambient temperature of the surface waters, whichever is greater; and (4) whether, with the proposed increase in effluent volume, the temperature outside the mixing zone will exceed 20? Celsius or the ambient temperature of the surface waters, whichever is greater.[25]

JUDGMENT VACATED;
CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO REMAND THE CASE TO THE MARYLAND DEPARTMENT OF THE ENVIRONMENT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION;
COSTS TO BE PAID BY THE APPELLEE.

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[25] On remand, if the MDE applies the temperature regulation and finds that there is no violation of the thermal criterion with the current effluent flow, the MDE then will have to determine whether an increase in the discharge of effluent will result in a temperature violation. Clearly we are not calling for the agency to require the County to dump an extra 400,000 gallons per day of effluent into the Piney Run to be able to measure the resulting temperature outside of the mixing zone and compare it with the stream's ambient temperature. Rather, some type of surrogate measurement or analysis will have to be made in order to determine whether there will be a future violation with the proposed increase in effluent. We will leave the job of how to make such a determination to the agency's expertise.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1283
CA-98-3124-Y

Filed: November 6, 2001
[Entered: November 6, 2001]

THE PINEY RUN PRESERVATION ASSOCIATION,
Plaintiff-Appellee,

v.

COUNTY COMMISSIONERS OF
CARROLL COUNTY, MARYLAND,
Defendant-Appellant.

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES; WATER ENVIRONMENT FEDERATION; MARYLAND ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INCORPORATED; VIRGINIA ASSOCIATION OF MUNICIPAL WASTEWATER AGENCIES, INCORPORATED; WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION, INCORPORATED; AMERICAN CHEMISTRY COUNCIL; AMERICAN FOREST AND PAPER ASSOCIATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; GENERAL ELECTRIC COMPANY; NATIONAL ASSOCIATION OF MANUFACTURERS; UTILITY WATER ACT GROUP; VIRGINIA MANUFACTURERS ASSOCIATION; M.A.D.E.IN MARYLAND; ALLIANCE OF AUTOMOBILE MANUFACTURERS;

AMERICAN IRON AND STEEL INSTITUTE;
AMERICAN PETROLEUM INSTITUTE;
ENVIRONMENTAL FEDERATION OF OKLAHOMA;
MICHIGAN MANUFACTURERS ASSOCIATIONS;
MISSISSIPPI MANUFACTURERS ASSOCIATION;
NATIONAL PETROCHEMICAL AND REFINERS
ASSOCIATION; NUCLEAR ENERGY INSTITUTE;
WESTERN STATES PETROLEUM ASSOCIATION,
Amici Curiae.

No. 00-1322

THE PINEY RUN PRESERVATION ASSOCIATION,
Plaintiff-Appellant,

v.

COUNTY COMMISSIONERS OF CARROLL
COUNTY, MARYLAND,
Defendant-Appellee.

ASSOCIATION OF METROPOLITAN SEWERAGE
AGENCIES; WATER ENVIRONMENT FEDERATION;
MARYLAND ASSOCIATION OF MUNICIPAL
WASTEWATER AGENCIES, INCORPORATED;
VIRGINIA ASSOCIATION OF MUNICIPAL
WASTEWATER AGENCIES, INCORPORATED;
WEST VIRGINIA MUNICIPAL WATER QUALITY
ASSOCIATION, INCORPORATED; AMERICAN
CHEMISTRY COUNCIL; AMERICAN FOREST
AND PAPER ASSOCIATION; CHAMBER OF
COMMERCE OF THE UNITED STATES OF
AMERICA; GENERAL ELECTRIC COMPANY;

NATIONAL ASSOCIATION OF MANUFACTURERS; UTILITY WATER ACT GROUP; VIRGINIA MANUFACTURERS ASSOCIATION; M.A.D.E.IN MARYLAND; ALLIANCE OF AUTOMOBILE MANUFACTURERS; AMERICAN IRON AND STEEL INSTITUTE; AMERICAN PETROLEUM INSTITUTE; ENVIRONMENTAL FEDERATION OF OKLAHOMA; MICHIGAN MANUFACTURERS ASSOCIATIONS; MISSISSIPPI MANUFACTURERS ASSOCIATION; NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION; NUCLEAR ENERGY INSTITUTE; WESTERN STATES PETROLEUM ASSOCIATION, Amici Curiae.

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

\s\ Patricia S. Connor
Clerk

33 USC Sec. 1311

Sec. 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

Sec. 1342. National pollutant discharge elimination system

* * *

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.

* * *

33 USC Sec. 1362

Sec. 1362. Definitions

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

* * *

§ 1365. Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * *

33 USC Sec. 1370

Sec. 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall

(1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce

(A) any standard or limitation respecting discharges of pollutants, or

(B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or

(2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

40 C.F.R. § 122.4

§ 122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

No permit may be issued:

(a) When the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA;

(b) When the applicant is required to obtain a State or other appropriate certification under section 401 of CWA and § 124.53 and that certification has not been obtained or waived;

(c) By the State Director where the Regional Administrator has objected to issuance of the permit under § 123.44;

(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States;

* * *

§ 9-324 Issuance of discharge permit.

(a) In general. -- Subject to the provisions of this section, the Department may issue a discharge permit if the Department finds that the discharge meets:
  (1) All applicable State and federal water quality standards and effluent limitations; and
  (2) All other requirements of this subtitle.

(b) Compliance with Title 1, Subtitle 6 of this article. -- Before issuing a discharge permit, the Department shall comply with the provisions of Title 1, Subtitle 6 of this article.

(c) Time and place of information meeting. -- The information meeting required by Title 1, Subtitle 6 of this article shall be held in the geographical area that will be most directly affected if the discharge permit is issued.

(d) Public notice of application. -- The Department shall give public notice of each application for a discharge permit as required by Title 1, Subtitle 6 of this article, and by making available to the public appropriate documents, permit applications, supporting material, plans, and other relevant information.

.03-3 Water Quality Criteria Specific to Designated Uses.

A. Criteria for Use I Waters-Water Contact Recreation and Protection of Aquatic Life.

(1) Bacteriological. There may not be any sources of pathogenic or harmful organisms in sufficient quantities to constitute a public health hazard. A public health hazard will be presumed:

(a) If the fecal coliform density exceeds a log mean of 200 per 100 milliliters, based on a minimum of not less than five samples taken over any 30-day period;

(b) If 10 percent of the total number of samples taken during any 30-day period exceed 400 per 100 milliliters; or

(c) Except when a sanitary survey approved by the Department of the Environment discloses no significant health hazard, Sec. A(1)(a) and (b) do not apply.

(2) Dissolved Oxygen. The dissolved oxygen concentration may not be less than 5 milligrams/liter at any time.

(3) Temperature.

(a) The maximum temperature outside the mixing zone determined in accordance with Regulation .05 of this chapter or COMAR 26.08.03.03 -.05 may not exceed 90(F (32(C) or the ambient temperature of the surface surface waters, whichever is greater.

(b) A thermal barrier that adversely affects aquatic life may not be established.

(4) pH. Normal pH values may not be less than 6.5 or greater than 8.5.

(5) Turbidity.

(a) Turbidity may not exceed levels detrimental to aquatic life.

(b) Turbidity in the surface water resulting from any discharge may not exceed 150 units at any time or 50 units as a monthly average. Units shall be measured in Nephelometer Turbidity Units.

(6) Toxic Substance Criteria. All toxic substance criteria to protect:

(a) Fresh water aquatic organisms apply in waters designated as fresh water in Regulation .03-1B;

(b) Estuarine or salt water aquatic organisms apply in waters designated as estuarine or salt waters as specified in Regulation .03-1B; and

(c) The wholesomeness of fish for human consumption apply in fresh, estuarine, and salt waters.

B. Criteria for Use I-P Waters-Water Contact Recreation, Protection of Aquatic Life and Public Water Supply. The following criteria apply:

(1) The criteria for Use I waters in Sec. A(1)-(5); and

(2) Toxic Substance Criteria. All toxic substance criteria:

(a) For protection of fresh water aquatic organisms apply; and

(b) To protect public water supplies and the wholesomeness of fish for human consumption apply.

C. Criteria for Use II Waters-Shellfish Harvesting.

(1) Bacteriological. There may not be any pathogenic or harmful organisms in sufficient quantities to constitute a public health hazard in the use of waters for shellfish harvesting. A public health hazard will be presumed:

(a) If the most probable number (MPN) of fecal coliform organisms exceeds a median concentration of 14 MPN per 100 milliliters;

(b) If more than 10 percent of samples taken exceed 43 MPN per 100 milliliters for a 5-tube decimal dilution test or 49 per 100 milliliters for a 3-tube decimal dilution test; or

(c) Except when a sanitary survey approved by the Department of the Environment discloses no significant health hazard, Sec. C(1)(a) and (b) do not apply.

(2) Dissolved oxygen-same as Use I waters.

(3) Temperature-same as Use I waters.

(4) pH-same as Use I waters.

(5) Turbidity-same as Use I waters.

(6) Toxic Substance Criteria. All toxic substance criteria to protect:

(a) Estuarine or salt water aquatic organisms apply in accordance with the requirements of Regulation .03-1B; and

(b) The wholesomeness of fish for human consumption apply.

D. Criteria for Use III Waters-Natural Trout Waters.

(1) Bacteriological-same as Use I waters.

(2) Dissolved Oxygen. The dissolved oxygen concentration may not be less than 5 milligrams/liter at any time, with a minimum daily average of not less than 6 milligrams/liter.

(3) Temperature.

(a) The maximum temperature outside the mixing zone determined in accordance with Regulation .05 of this chapter or COMAR 26.08.03.03-.05 may not exceed 68(F (20(C) or the ambient temperature of the surface waters, whichever is greater.

(b) A thermal barrier that adversely affects aquatic life may not be established.

(4) pH-same as Use I waters.

(5) Turbidity-same as Use I waters.

(6) Total Residual Chlorine (TRC). Except as provided in COMAR 26.08.03.06, the Department may not issue a permit allowing the use of chlorine or chlorine-containing compounds in the treatment of wastewaters discharging to Use III and Use III-P waters.

(7) Toxic Substance Criteria. All toxic substance criteria to protect:

(a) Fresh water aquatic organisms apply; and

(b) The wholesomeness of fish for human consumption apply.

E. Criteria for Use III-P Waters-Natural Trout Waters and Public Water Supplies.

(1) Exception. Authorized operation of the Little Seneca Creek Dam means that all operational activities permitted are met under the conditions of a dam operating permit issued by the Department of Natural Resources under Natural

Resources Article, Sec. 8-801-8-814, Annotated Code of Maryland, and COMAR 08.05.03. Injury resulting from the authorized operation of Little Seneca Creek Dam to the Use III natural trout fishery recognized in the stream use designation assigned to Little Seneca Creek in Regulation .08 of this chapter is not considered a violation of this chapter.

(2) The following criteria apply:

(a) The criteria for Use III waters in Sec. D(1)-(6); and

(b) All toxic substance criteria to protect:

(i) Fresh water aquatic organisms, and

(ii) Public water supplies and the wholesomeness of fish for human consumption.

* * *

JAMES JOHN DIETER,
DEFENDANT'S WITNESS SWORN

THE CLERK: Please state your name for the record and, please spell your last name.

THE WITNESS: My name is John James Dieter, D-i-e-t-e-r.

* * *

DIRECT EXAMINATION

* * *

BY MS. WOOLF:

Q Mr. Dieter, where are you currently employed?

A. I'm currently employed by the Maryland Department of the Environment.

Q And are you here today pursuant to the subpoena issued by my office?

A Yes, I am.

Q What is your position MDE?

A At the present time, I am the Program Administrator of the Waste Water Permits Division.

Q In that role, have you had occasion to be involved from time to time with the H[amp]stead Waste Water Treatment plant in Carroll County?

A Yes, I have.

Q How long have you been the position that you are now in?

A I became the Acting Program Administrator in April of 1998.

Q And prior to that did you hold any other position with MDE?

A Prior to that I worked in the water supply section and was hired from MDE in February of 1997.

Q And since you have been at MDE have you had on-going involvement with Carroll County with respect to the H[amp]stead plant?

A Yes.

Q In that role, have you become familiar with the various permits that have been issued to the plant by MDE?

A Yes, I've reviewed the files, the 1990 permit files and was involved with the permit modification and the recent permit modification.

Q The recent one being the 1997?

A The 1997, yes.

Q And have you been involved in the modification related to the proposed chiller?

A Yes, ma'am.

Q You mentioned that you had reviewed the 1990 permit file. Based upon your review, is it your understanding that the 1990 permit was subject to the administrative proceedings related to public hearings, notice, opportunities, comments and so forth?

A To the best of my knowledge all procedures were followed.

Q Did you see anything in the course of your review related to comments, protests, challenges based upon the absence of a limitation for a temperature in the permit that was also an issue effective March 3, 1990?

A No, ma'am. I did not see any.

Q Let me show you what has been marked... as Defendant's Exhibit No. 7 which has been previously identified as the 1990 permit....

* * *

Q Have you seen that permit before, Mr. Dieter?

A Yes, ma'am.

Q Does the 1990 permit that was issued to the plant contain any limitation on the temperature of the [e]ffluent?

A No, ma'am.

Q Would a special limitation be included in the [e]ffluent characteristics — under that [e]ffluent limitation?

MR. NELSON: Objection.

THE COURT: You may answer. Are you familiar with the preparation of these reports — these reports?

THE WITNESS: I'm not familiar with the preparation in 1990. I reviewed the 1990 permit.

THE COURT: So you don't know about 1990?

THE WITNESS: I was not employed by MDE in 1990.

* * *

Q Mr. Dieter, are you familiar with the decision that was issued by the Court of Special Appeals entitled *Woodward v. Maryland Department of the Environment*? That came out in August of 1998.

A Yes, I am.

Q Prior to the time that opinion came out, had MDE, to the best of your knowledge, ever taken the position that the temperature of the discharge, a sewage treatment plant, was a pollutant?

MR. NELSON: Objection. Relevance.

THE COURT: You may answer.

THE WITNESS: MDE had never taken that position prior to that court decision.

BY MS. WOOLF:

Q Are you familiar with the regulations in COMAR that are related to the water quality standards that were discussed in the Woodward opinion?

A Yes, I am.

Q Let me show you, sir, a copy of COMAR.

MR. NELSON: — copy? May I be heard briefly?

THE COURT: What?

MR. NELSON: May I be heard briefly? I think is -- counsel is seeking to invoke expert interpretation of COMAR. This is a COMAR regulation. I don't know what a –

THE COURT: Well, let's wait and find out.

MR. NELSON: Very well.

BY MS. WOOLF:

Q Mr. Dieter, let me hand you a copy of an [excerpt] in COMAR. Is that the water quality standard regulation that you are familiar with in your role — in your capacity at MDE?

A Yes, this is water quality criteria.

Q And are you familiar with the COMAR regulation that defines pollution and pollutant?

A Yes, I am.

Q Now, you mentioned that MDE had not to your knowledge ever taken the position that the temperature of a discharge from a sewage treatment plant - what is your understanding of the reason why not?

MR. NELSON: I object.

THE COURT: Do you know why not?

THE WITNESS: From review of the files and discussion with the staff, yes, I think I do.

MR. NELSON: I object. It seeks a legal opinion –

THE COURT: I don't think that is an appropriate question.

MS. WOOLF: Your Honor, I am not asking for a legal opinion. I am asking for MDE's view point on this issue.

THE COURT: Well, what did you learn as a result of these discussions that you've had?

MR. NELSON: With all due respect, I object.

THE COURT: You have your objection.

THE WITNESS: Discussions indicated that MDE staff had looked at the issue of heat as a pollutant and had determined that because domestic waste water treatment plants did not intentionally increase temperature, did not intentionally add heat to the discharges that, in fact, they weren't considered a pollutant and that the discharges were basically [de minimis] in the fact that they did not create any harmful deleterious affects to the receiving bodies.

* * *

CROSS-EXAMINATION

* * *

Q Now, you reached the judgment or you conveyed to us the notion that M[D]E thought that heat was not a pollutant because there was no intentional heating of the [e]ffluent. They didn't [intentionally] do that.

A That's correct.

Q And then they said they did. It was really [de minimis] it wouldn't [harm] the stream.

A That's correct.

Q Now, let's assume hypothetically, Mr. Dieter, that they did intentionally heat the sewage, and let's assume hypothetically that it did harm the stream. Under those circumstances, would you agree, that heat was a pollutant?

MS. WOOLF: Objection to form.

THE COURT: Well, under circumstances the witness would not indicate those are applicable here, but you may answer.

THE WITNESS: If they intentionally - if hypothetically intentionally heated the water -

MR. NELSON: Yes, sir.

THE WITNESS: — and hypothetically created a deleterious affect on the stream, then hypothetically, it would be considered a pollutant, yes.

BY MR. NELSON:

Q All right. Now, let me refine that hypothetical a little bit. What I am talking about is converting the upper reaches of the Piney Run into — which trout cannot propagate and reproduce and survive. Would that be your definition of — stream?

A Yes, it would.

Q All right. So if we have intentionally heating of the [e]ffluent and — as I just described — I asked you hypothetically. I know you haven't told me you agree to that. That would be your definition of a —

A Yes, I believe it would.

***

Q After the Court of Special Appeals ruling *Woodward v. M[D]E* did you start to disclose the temperature limit on other sewage treatment plants that discharged in this — stream. Correction. Class 3 stream?

A No, we have not.

Q You have not. Why not?

A We have begun to as part of working towards to looking at the limitations. We have begun to ask those sewage treatment plants and those permits upon renewal to begin to secure temperature data which had not been previously required in order to make a determination as to whether or not the ambient - what perhaps could be the ambient temperature of the stream, what the temperature of the effluent was being discharged to the stream also.

Q So if would you agree then, would you not, that from any sewage treatment plant discharge into a class 3 stream, if I owned a plant and wanted to build a plant now and I wanted it discharge into a class 3 stream, you would make me consider temperature, would you not?

A MDE as a result of the *Woodward* decision has rethought its position on temperature limitations and would require you to address that issue. Whether or not it would become a permanent limit is a question I guess that would have to be looked at on an individual basis of the individual quality of the receiving body.

JAMES SLATER,
DEFENDANT'S WITNESS, SWORN

THE CLERK: Please be seated. Would you, please state your name and spell your last name.

THE WITNESS: Yes, my name is James Edward Slater, Jr. The last name is S-l-a-t-e-r.

THE CLERK: Thank you.

* * *

DIRECT EXAMINATION

* * *

BY MS. WOOLF:

Q Good afternoon, Mr. Slater.

A Good afternoon.

Q Where are you currently employed?

A I'm employed by Carroll County.

Q And how long have you been employed by Carroll County?

A I've been employed by Carroll County since May of 1990.

Q What is your education background ---

A I have a Bachelor's and a Master's degree in geography and environmental planning. I have other studies performed in civil engineering and urban planning techniques as well.

Q Have you had any additional training in the field of environmental sciences or environmental engineering or similar --

A Yes, over the years I've had numerous training workshops and the like, including training in things like hazardous materials response, river restoration techniques, hydrology, hydraulics, wetland delineation, forest conservation techniques, land development techniques, things of that nature.

* * *

Q Have you received any licenses or certificates in these fields?

* * *

THE WITNESS: Yes, I'm a member of the American Institute of Certified Planners. I also have a license in - called the Qualified Professional License through the International IPEP and the - I have - I'm certified by the Department of Natural Resources as an instructor in forest preservation sciences.

Q Your current title is Environmental Compliance Officer?

A Environmental Compliance Specialist, yes.

Q Have you held any other positions with Carroll County since 1990?

A Yes, when I started with the county in 1990, I was director of a new department, Natural Resource Protection. There had been several political reorganizations along the way, and I was administrator or environmental services for a while and then chief of the Bureau of Environmental Services. And then as a reorganization last February, I was - the functions were broken apart and I was assigned to the Department of Public Works to handle compliance issues for the county.

Q — in Carroll County in 1990, were you employed in any field that is related to environmental sciences or protection?

A Yes, I was employed by - from 1976 through 1990 with the Bechtel Corporation in the Gaithersburg office and worked on a number of projects for them for that involved - I was specialist in terrain analysis in gemology, for example. I was also in charge of their environmental licensing group for the past - for - about six, seven years towards the end of my tenure with them involved in securing permits and maintaining permits for their client facilities.

Q Either in your employment with Bechtel or with Carroll County, have you become familiar with the [NPDES] permitting procedures as administered in Maryland by the Maryland Department of the Environment?

* * *

THE WITNESS: Yes, I'm very familiar with that process. I handled many [NPDES] permits when I worked for Bechtel for various facilities not only in the capacity of securing permits for clients but also for maintaining them. Since 1990 -

THE COURT: You're very familiar with them?

THE WITNESS: Pardon me?

THE COURT: You're very familiar with them?

THE WITNESS: Indeed, sir. Yes, I am.

* * *

Q In your various capacities with Carroll County, have you become familiar with the permitting history for the H[amp]stead Waste Water Treatment?

A Yes, I have.

Q And have you reviewed in your -- in connection with your work for Carroll County, have you reviewed the various permits that have been issued to the plant ---

A Yes, I have.

* * *

Q Okay. March 1 of 1990. I believe the date of the permit you identified as Exhibit 7. Could you pull that out of that stack?

A Yes, that's correct.

Q Mr. Slater, in reviewing the plan's permit or based on your other experience, are you familiar with the term [e]ffluent limitation as used in MDE permits?

A Yes, I am.

* * *

BY MS. WOOLF:

Q And what is your understanding of the meaning of that term?

* * *

THE WITNESS: In an [NPDES] permit there are conditions and those conditions are broken down into characteristics or criteria of [e]ffluent. And each one of those criteria has a specific limitation to it.

BY MS. WOOLF:

Q Is there a section of a permit which is referenced [e]ffluent limitation?

A Yes, there is.

Q In reference to Exhibit 7?

A Yes, there is.

Q And where does that appear in the permit itself?

A Take the clip off for a minute. The [e]ffluent limitations and special conditions are listed on page two and [e]ffluent characteristics immediately below that.

Q And what are the parameters or the conditions that are subject to a specific [e]ffluent limitation in 1995?

A BOD which biological [oxygen] demand, suspended solids, TKN and total phos[ph]orous and total nitrogen in this case is not applicable but total phos[ph]orous --- total residual chlorine and dissolved []oxygen, PH and flow. However, flow is noted as not being a limitation but rather to be used only in calculation.

Q Mr. Slater, is there any [e]ffluent limitation for temperature in the 1990?

A No, ma'am, there is none.

* * * *

Q Are you familiar with any [e]ffluent limitation for temperature in any of the plant's permits?

A No, I am not familiar with any.

Q ---

A Not associated with a domestic waste water treatment plant. No, I have not.

Q Mr. Slater, are you familiar with monitoring requirements under the [NPDES] specifically?

A Yes, I am.

* * *

Q Mr. Slater, have you ever seen a monitoring requirement or sampling requirement in the plant's permit for the temperature of plant's [e]ffluent?

A No. I have not ever seen any requirement. The reporting forms have temperature on them, and the intent of that is that temperature can drastically alter test results. So in that sense, it's good to know when M[D]E - M[D]E requires that every test taken in a plant or for a plant be reported to them on their monthly reporting forms. If temperature is taken in a plant, then it has to be repo ed to M[D]E. But in this case, temperature is taken and reported in that it can affect sampling results.

Q You mentioned the monthly reporting form. Let me show you what was previously marked as Defendant's Exhibit 13 and then ask you, sir, if these appear to be the forms that you just referred to?

A Yes, they appear to be it.

Q Do you have a term by which there are referred to?

A Monthly reporting forms is generally although it's not titled as such, that's generally the accepted terminology.

Q Now, have you in your areas positions with Carroll County, have you had occasion to observe these monthly reporting forms over a period of years?

A Over a period of years, yes. I certainly don't look at them every month, but I have reviewed them on occasion.

Q And is there a place on those forms for reporting temperature?

A No. Well, excuse me. Yes, there is. I'm going to say to myself there is a place for reporting temperatures.

Q Okay. And where does that appear to be?

A In the far right-hand column.

Q And that --

A And that's temperature of the [e]ffluent.

Q Temperature of the [e]ffluent. Is there anything on there about the temperature of the stream?

A Not on these forms, no. No, it goes from my --- oxidation digester and to [e]ffluent.

* * *

Q Now, what is your understanding as to whether the temperatures of the plant's [e]ffluent not being recorded on these monthly reporting forms to the Maryland Department of the Environment?

A It's been my experience that they are reported regularly.

Q And have that been true since - during the entire time that plants have been under the MDE permit?

A As long as I have knowledge of it, yes, which is back to 1990.

Q And to those forms show the temperature of the plant's [e]ffluent every single day for every month back to 1990?

A I believe they do, yes.

Q And are they sent to MDE?

A Yes, yes. As I mentioned every reading that's taken within the plant is sent to MDE on reporting forms.

Q Are you aware of any occasion that MDE notified Carroll County that the temperature of the plant's [e]ffluent indicated some violation or problem with respect to the [e]ffluent?

A No, I'm not.

Q Under the permit?

A Never. There has never been any violation associated with temperature.

Q Let me ask you, sir, to turn to Exhibit 7 which is the 1990 permit. I believe it's page two. Let me check. On page two of the 1990 permit there are a series of footnotes and I am going to ask you to look at the one that has one asterisk.

A Yes.

Q Do you see that footnote?

A Yes, I do.

Q Do you recall Mr. Nelson asking you questions about that footnote when he was deposing you?

A Yes, ma'am, I do.

Q Now, I am asking you to look at the language that states I believe - let me get this right. Discharge of any pollutant listed above --

A Not shown shall be illegal.

Q Now, with respect to the plant's temperature, has anyone from MDE ever indicated to anyone at Carroll County to the best of your knowledge that the temperature of the plant's [e]ffluent came within the scope of that footnote?

A No, they never did.

Q Now, is it your understanding as Compliance Officer or as any other - or within the scope of any other position you've held with Carroll County, does the temperature of the plant's [e]ffluent come within that footnote?

A No -

* * *

Q Now, has anyone from MDE ever told Carroll County to the best of your knowledge that the discharge temperature [e]ffluent came within the scope of that ---

MR. NELSON: Object.

THE COURT: You may answer. Do you know?

THE WITNESS: No, I have never been told that.

BY MS. WOOLF:

Q Mr. Slater, after - in any of your positions with Carroll County, did there come a time when you became aware of an issue with regard to the discharge temperature of a plant --

A Oh, yes.

Q And approximately when was that?

A Oh, early 1990's I would say. As early as 1993, '92 possibly, but '93 at least.

Q And how is it that you became aware of that issue?

A Specifically, because of concerns raised by the Piney Run Citizens Association.

* * *

CROSS-EXAMINATION

* * *

Q Let me direct your attention, please to Defendant's Exhibit 7. This is the permit. Do you have that?

A I have it.

Q Do you have it, sir?

A Yes, I do.

Q Now, I want to direct your attention to page two of that.

A Okay.

Q And most specifically direct your attention to the footnote which states, "Discharge of pollutants not shown shall be illegal."

A Yes, sir.

Q Now, my understanding of your testimony on direct examination was that you interpret that phrase not to include heat?

A I don't believe I ever said that.

Q You didn't say that. Well, would you agree it includes it heat?

A I do agree that the Clean Water Act indicates heat as pollutant, yes.

Q Okay. And you agree that - your firm states unequivocally - when I say your I don't mean your personally.

A Certainly.

Q Discharge of pollutants not shown shall be illegal.

A Yes, sir.

Q And you agree, sir, that those words mean, "Exactly what it says?"

A That's what I indicated to you before, and I still believe that.

* * *

Q Okay. My question, sir, is if I asked you what does the phrase mean, "Discharge of pollutants not shown shall be "illegal," and you responded "Exactly what it says." I asked, "And what is that just as the words appear on the page?" Answer: "Certainly, sir. With discharge of pollutants not I'll read it exactly as it's stated ---

A Yes. That's what - yes.

Q And you didn't tell me at that time that phrase was qualified and would not apply if, in your judgment, didn't cause harm to the stream?

A No, no. I didn't. Frankly, the circumstances at depositions were somewhat more limiting than they are right now.

* * *

State of Maryland
DEPARTMENT OF THE ENVIRONMENT
2500 Broening Highway, Baltimore, Maryland 21224
Area Code 301-631-3671

William Donald Schaefer
Governor

Martin W. Walsh, Jr.
Secretary

DISCHARGE PERMIT

State Discharge	Effective Date: March 1, 1990
NPDES Permit Number: 88-DP-0594	Expiration Date: February 28, 1995

Pursuant to the provisions of Title 9 of the Environment Article, Annotated Code of Maryland, and implementing regulation COMAR 26.08.01 et seq. And the provisions of the Clean Water Act (33 U.S.C. Sections 1251, et seq.) and implementing regulations 40 C.F.R. Parts 122, 123, 124, and 125, the Department of the Environment hereby authorizes

Carroll County Dept. of Public Works
Bureau of Utilities
225 North Center Street
Westminster, Carroll County, Maryland 21157

DISCHARGE FROM: Hampstead Waste Water Treatment Facility
LOCATED AT: 801 Century Street, Hampstead, Carroll County
THROUGH OUTFALL(s): 001-Facility Effluent
002-West Pumping Station
003-Shiloh Pumping Station

TO: Piney Run, which is classified as Class III waters, protected for the growth and propagation of trout, in accordance with the following special and general conditions and a map incorporated herein and made a part hereof.

I. SPECIAL CONDITIONS

A. EFFLUENT LIMITATIONS, POINT SOURCE 001*

Effective March 1, 1990, and lasting until February 28, 1995, the quality of the effluent discharge shall be limited at all times as follows:**

Effluent Characteristic: BOD5 5/1 to 9/30
10/1 to 4/30

Monthly Loading Rate Kg/D (lbs/D)	Weekly Loading Rate Kg/D (lbs/D)	Monthly Average mg/l	Weekly Average mg/l
38 (83)	57 (130)	20	30
57 (130)	85 (190)	30	45

* Renewal permit limitations may or may not be equal to the above limitation; discharge of pollutants not shown shall be illegal.

** There shall be no discharge of floating solids of visible foam other than trace amount.

Effluent Characteristic: Suspended Solids

Monthly Loading Rate Kg/D (lbs/D)	Weekly Loading Rate Kg/D (lbs/D)	Monthly Average mg/l	Weekly Average mg/l
57 (130)	85 (190)	30	45

Effluent Characteristic: TKN 5/1 to 9/30

Monthly Loading Rate Kg/D (lbs/D)	Weekly Loading Rate Kg/D (lbs/D)	Monthly Average mg/l	Weekly Average mg/l
28 (62)	42 (92)	15	22

Effluent Characteristic: Total P

Monthly Loading Rate Kg/D (lbs/D)	Weekly Loading Rate Kg/D (lbs/D)	Monthly Average mg/l	Weekly Average mg/l
1.9 (4.2)	2.8 (6.2)	1	1.5

Effluent Characteristic: Total N

Monthly Loading Rate Kg/D (lbs/D)	Weekly Loading Rate Kg/D (lbs/D)	Monthly Average mg/l	Weekly Average mg/l
N/A	N/A	N/A	N/A

Effluent Characteristic: Fecal Coliforms

Maximum	Minimum
200 MPN/100 ML monthly log mean value	N/A

Effluent Characteristic: Total Residual Chlorine

Maximum	Minimum
Discharge of effluents treated with chlorine compounds is prohibited	

Effluent Characteristic: Dissolved oxygen

Maximum	Minimum
N/A	6.0 mg/1 at any time

Effluent Characteristic: pH

Maximum	Minimum
8.5	6.5

Effluent Characteristic: Flow***

Maximum	Minimum
0.5 mgd	0.5 mgd

B. MONITORING REQUIREMENTS, POINT SOURCE 001

The effluent characteristics shall be monitored as follows:

Effluent Characteristic: BOD5

Measurement Frequency	Sample Type
Two per week	8 hr. composite, one grab/hr.

*** Flow used in waste allocation calculations, not to be considered a limitation.

Effluent Characteristic: Suspended Solids

Measurement Frequency	Sample Type
Two per week	8 hr. composite, one grab/hr.

Effluent Characteristic: TKN (5/1 - 9/30)

Measurement Frequency	Sample Type
Two per week	8 hr. composite, one grab/hr.

Effluent Characteristic: Total Phosphorus

Measurement Frequency	Sample Type
Two per week	8 hr. composite, one grab/hr.

Effluent Characteristic: Ortho Phosphorus

Measurement Frequency	Sample Type
One per month	24 hr. composite, one grab/hr.

Effluent Characteristic: Ammonia Nitrogen

Measurement Frequency	Sample Type
One per month	24 hr. composite, one grab/hr.

Effluent Characteristic: NO3 + NO2 Nitrogen

Measurement Frequency	Sample Type
One per month	24 hr. composite, one grab/hr.

Effluent Characteristic: Organic Nitrogen

Measurement Frequency	Sample Type
One per week	24 hr. composite, one grab/hr.

Effluent Characteristic: Fecal Coliforms

Measurement Frequency	Sample Type
One per week	Grab

Effluent Characteristic: Total Residual Chlorine

Measurement Frequency	Sample Type
N/A	N/A

Effluent Characteristic: Dissolved Oxygen

Measurement Frequency	Sample Type
Two per day	Grab

Effluent Characteristic: pH

Measurement Frequency	Sample Type
Two per day	Grab

Effluent Characteristic: Flow

Measurement Frequency	Sample Type
Continuous	Recorded

* * *

II. GENERAL CONDITIONS

A. MANAGEMENT REQUIREMENTS

1. Change in Discharge

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit or in the application submitted for this permit, including any formally submitted application revisions that are not authorized, applied for or specifically identified in this permit, shall constitute a violation of the terms and conditions of this permit. Any anticipated facility expansions, production increases, or process modifications which will result in new, different or increased discharge of pollutants shall be reported by the permittee by submission of a new application at least 180 days prior to the commencement of the changed discharge or, if such changes will not violate the effluent limitations specified in this permit, by notice to the Department. Following such notice, the permit may be modified by the Department to specify and limit any pollutants not previously limited.

* * *

5. Reapplication for a Permit

At least 180 days before the expiration date of this permit, unless permission for a later date has been granted by the Department, the permittee shall submit a new application for a permit or notify the Department of the intent to cease discharging by the expiration date. In the event that a timely and sufficient reapplication has been submitted and the Department is unable, through no fault of the permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit are automatically continued and remain fully effective and enforceable.

6. Permit Modification

A permit may be modified by the Department upon the written request of the permittee and after notice and opportunity for a public hearing in accordance with the provisions set forth in COMAR 10.50.01.12.

* * *

12. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority of Section 510 of the Clean Water Act of 1977 as amended.

* * *

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits

FROM: Robert Perciasepe
Assistant Administrator for Water
Steven A. Herman
Assistant Administrator for Enforcement and Compliance Assurance
Jean C. Nelson
General Counsel

TO: Regional Administrators
Regional Counsels

On July 1, 1994, we issued a memorandum entitled "Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES permits." Subsequently we have been asked to clarify that a discharger must provide the information in writing for the permit record in order to obtain the authorization to discharge and the shield provided by a National Pollutant Discharge Elimination System (NPDES) permit.

Thus, we are reissuing the July 1, 1994 memorandum with additional text to clarify this point. All of the new text is indicated by *italics* text. There are no other changes to the July 1994 memorandum, except on the last page we have updated the schedule to indicate revised dates for proposal for the municipal

and industrial application requirements and revised the phone numbers and organizational affiliations of the contact persons. The full text of the now revised July 1994 memorandum appears immediately below.

* * *

Recently questions have been raised regarding EPA's interpretation of the scope of the "shield" associated with National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). Section 402(k) of the CWA - the "shield" provision - provides that compliance with an NPDES permit shall be deemed compliance, for purposes of section 309 and 505 enforcement, with sections 301, 302, 306, 307 and 403 of the CWA (except for any standard imposed under section 307 for toxic pollutants injurious to human health). This policy statement describes EPA's position on the scope of the authorization to discharge under an NPDES permit, and the shield thus associated with the permit authorization.

Individual NPDES Permits

As part of an application for an individual NPDES permit, EPA requires that an applicant provide information on its facility. In the case of industrial permit applications, this includes specific information about the presence and quantity of a number of specific pollutants in the facility's effluent, as well as on all waste streams and operations contributing to the facility's effluent and the treatment the wastewater receives. Applications for municipal discharges focus primarily on the operation and treatment processes at the municipal treatment works. See 40 C.F.R. §122.21.

Historically, EPA has viewed the permit, together with material submitted during the application process and information in the public record accompanying the permit, as important bases for an authorization to discharge under section 402 of the CWA. The availability of the section 402(k) shield is predicated upon the issuance of an NPDES permit and a permittee's full compliance with all applicable application requirements, any additional information requests made by the permit authority and any applicable notification requirements. See 40 C.F.R. §§122.41(1) and 122.42. Also see, 45 Fed. Reg. 33311-12, 33522-23 (May 19, 1980).

A permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, waste streams and operations that have been clearly identified in the permit application process when discharged from specified outfalls:

1) Pollutants specifically limited in the permit or pollutants which the permit, fact sheet, or administrative record explicitly identify as controlled through indicator parameters;[26]

2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified *in writing* as present in facility discharges during the permit application process *and contained in the administrative record which is available to the public;* and

---

[26] Of course, authorization is only provided to discharge such pollutants within the limits and subject to the conditions set forth in the permit.

3) Pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified *in writing* during the permit application process *and contained in the administrative record which is available to the public.*[27]

With respect to subparts 2 and 3 of the permit authorization described above, EPA recognizes that a discharger may make changes to its permitted facility (which contribute pollutants to the effluent at a permitted outfall) during the effective period of the NPDES permit. Pollutants associated with these changes (provided they are within the scope of the operations identified in the permit application) are also authorized provided the discharger has complied in a timely manner with all applicable notification requirements (see 40 C.F.R. 122.41(1) and 122.42(a) & (b)) and the permit does not otherwise limit or prohibit such discharges.

Notwithstanding any pollutants that may be authorized pursuant to subparts 1 and 2 above, an NPDES permit does not authorize the discharge of any pollutants associated with wastestreams, operations, or processes which existed at the time of the permit application and which were not clearly identified during the application process.

* * *

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[27] The permit, of course, may explicitly prohibit or limit the scope of such discharges.

Supreme Court U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

(2)

No. 01-1172

IN THE

Supreme Court of the United States

THE PINEY RUN PRESERVATION ASSOCIATION,

Petitioner,

v.

COUNTY COMMISSIONERS
OF CARROLL COUNTY, MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

The Petition before this Court arises from the Fourth Circuit's decision in *The Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, No. 00-1283, published at 268 F.3d 255 (2001). In vacating the lower court's decision, the Fourth Circuit held that the County Commissioners of Carroll County ("the County") were shielded from liability under the Clean Water Act by virtue of the County's National Pollutant Discharge Elimination System (NPDES) permit, which authorized the discharge of treated effluent from the Hampstead Wastewater Treatment Plant ("the Plant").

The Fourth Circuit's lengthy, well-reasoned opinion[1] receives support from a similar decision by the Second Circuit, as well as the interpretation of the Environmental Protection Agency (EPA), the permitting authority. As the decision is consistent with the decisions this Court, the Courts of Appeals of other circuits, and the record, a writ of certiorari is not warranted and the Petition should be denied.

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1. The Fourth Circuit's opinion appears in the Appendix of the Petition for Writ of Certiorari. References in this Opposition to the Fourth Circuit's opinion are made pursuant to the page numbers in the Petitioner's appendix.

MISSTATEMENTS BY PETITIONER OF FACT AND LAW

Petitioner makes several erroneous statements of fact and law in its Petition that should not be accepted by the Court.

A. Petitioner's Misstatements of Fact

First, Petitioner mischaracterizes the procedural background of the case. Petitioner states that the County argued in its Motion for Summary Judgment that it could only be liable for discharges in excess of the water quality standard. (Pet. at 6). However, in actuality, the County presented numerous arguments to the District Court, including the argument addressed by the Fourth Circuit that its compliance with all limitations in the permit must be deemed compliance for the purposes of the Citizen Suit provision of the Clean Water Act, 33 U.S.C. § 1342(k). Such arguments are reflected in various papers before the District Court, including the County's Memorandum in Further Support of its Cross-Motion for Summary Judgment and in its Motion for Reconsideration following the District Court's final order.

Petitioner further misrepresents that the County did not introduce any evidence at trial that it had disclosed its "addition of heat" to MDE before the 1990 permit was issued. (Pet. at 7). However, the County introduced both documentary and testimonial evidence that the temperature of its effluent was fully disclosed to MDE. The County offered the testimony of a County representative, James Slater, and an MDE representative, James Dieter, to demonstrate that the County reported the temperatures of its effluent to MDE before, during, and after the issuance of its

current permit and the proposed permit modification. (Pet. at App. 31-32). The County also offered a sampling of monthly reports that had been submitted to MDE regarding various aspects of the effluent, including temperature. (*Id.*). The Fourth Circuit relied on this information — which was in the record — in reaching its decision. Petitioner's argument that the County introduced no evidence in this regard is incorrect.

Next, Petitioner misstates that temperature data collected by the County between 1996 and 1998 showed that the County added "thermal pollution" to the stream on 371 of 397 days measured. (Pet. at 6). In actuality, the record demonstrates that this data was not gathered for regulatory or compliance purposes; was not measured with instruments or in a manner sufficiently precise to meet regulatory standards; and, most importantly, did not include any records of temperatures downstream of the discharge. Instead, it merely reflected that, on some days, the temperature of the effluent *in the pipe* was one or two degrees higher than the stream temperature at various upstream locations. Thus, the record was totally inadequate to conclude that the effluent temperature caused "thermal pollution" to the Piney Run between 1996 and 1998.

In addition to misstating the procedural history, Petitioner mischaracterizes the Fourth Circuit's decision in several ways. First, it states that the Fourth Circuit found "de novo" that the County had adequately disclosed and MDE reasonably contemplated the discharge of heat. (Pet. at 9). This is incorrect. In reaching its decision, the Fourth Circuit relied on testimony that was presented to the District Court, both at the summary judgment stage and at trial. The fact that the Fourth Circuit disagreed with the District Court's interpretation of that evidence does not imply that it was a "de novo" decision.

More importantly, Petitioner mischaracterizes the Fourth Circuit's holding, stating that "the court concluded as a matter of law that . . . an agency's mere 'contemplation' of a discharge serves to incorporate unlimited amounts of that discharge into the permit." (Pet. at 9). On the contrary, the court specifically held that the temperature of the discharge would be limited to whatever is within the reasonable contemplation of MDE. (Pet. at App. 25-26). Thus, the County would not be permitted to discharge effluent of *any* temperature; it is limited to temperatures that are within the reasonable contemplation of MDE based upon its prior disclosures during the permitting process. Petitioner's characterization of the Fourth Circuit's holding is overly broad and misleading.

Petitioner also contends that the Fourth Circuit "acknowledged that the undisputed evidence proved that the County's discharges of heat violated the applicable water quality standard." (Pet. at 17). The Fourth Circuit made no such finding. In the discussion cited by Petitioner, the Fourth Circuit was merely reviewing the procedural history of the case, explaining that the District Court found violations of the Clean Water Act based on *its* interpretation of state water quality standards. (Pet. at App. 9-10). The Fourth Circuit made no assessment, however, of the evidence on which the District Court's decision was based, nor did it express agreement with the District Court's conclusion. (*Id.*). As a matter of fact, it vacated the District Court's decision and remanded the case to the District Court for entry of judgment in the County's favor. (Pet. at App. 32).

Finally, Petitioner improperly claims that the Fourth Circuit "did not consider the holding in ***Woodward*** [a Maryland Court of Special Appeals decision] that

MDE had not addressed the plant's thermal discharge." On the contrary, as explained more fully below, the court acknowledged the *Woodward* decision and found it irrelevant to the questions presented, because the decision related to the MDE's consideration of a 1991 modification to the County's permit, while the subject before the court was the alleged violations of the original permit.

B. Petitioner's Misstatements of Law

The majority of Petitioner's proposed reasons for granting the petition are based on misstatements of law. For instance, Petitioner cites *National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), *United States v. Frezzo Brothers, Inc.*, 602 F.2d 1123 (3d Cir. 1979), and *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546 (5th Cir. 1996), for the proposition that "a discharger may only add those pollutants allowed in the four corners of their permits." (Pet. at 12). This representation is patently false.

Each of these cases simply stands for the proposition that an individual or entity cannot discharge pollutants without a permit in the first instance. *Costle*, 568 F.2d at 1374; *Frezzo Bros.*, 602 F.2d at 1127-28; *Sierra Club*, 73 F.3d at 559. That was not disputed in this case and, in fact, the Fourth Circuit cited *Costle* for that proposition. However, none of these three cases dealt with the *scope* of limitations contained within a duly issued NPDES permit. Rather, in each of these cases, there were no permit limitations to interpret. Likewise, none of these cases involved the effect of disclosures by dischargers to permitting authorities in the permitting process. Thus, Petitioner's assertion that these cases hold that a discharger may only discharge those

pollutants specifically listed in the permit is entirely inaccurate. These cases are simply inapposite to the instant matter.

Similarly, Petitioner implies that numerous cases stand for the proposition that "a discharger violates the Act if its discharge contains a pollutant in quantities that violate either the applicable state water quality standard or the numerical effluent limitation in the permit." Petitioner cites *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995), *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S. Ct. 1900 (1994), *Environmental Protection Agency v. California*, 426 U.S. 200, 96 S. Ct. 2022 (1976), and *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S. Ct. 1046 (1992), in support of this assertion.

Petitioner's interpretation of these cases is overly broad. In actuality, none of these cases held that a discharger is flatly prohibited from discharging pollutants in violation of state water quality standards. *Northwest Environmental* and *EPA v. California* held that citizens may sue permit holders for violations of water quality standards *if those standards are incorporated into the permit*. 56 F.3d at 986; 426 U.S. at 223-24. *Jefferson County* held that a state is permitted to condition certification of a project on compliance with state standards. 511 U.S. at 711.

Arkansas held that the EPA could place limitations in a permit based on water quality standards and find a violation of the Clean Water Act if a discharger's effluent violates those standards, but the Court explicitly declined to address whether the Act itself mandates such action by the EPA, finding that it was within the EPA's discretion to require compliance with state water quality standards. The Court's

deference to the permitting authority in *Arkansas*, which was based in part on *Chevron USA, Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), is in accord with the Fourth Circuit's reliance on the same doctrine in the present case. Put simply, the cases cited by Petitioner involve interpretations of specific permit conditions, not a flat prohibition of discharges in violation of state water quality standards.

OBJECTIONS TO CONSIDERATION OF QUESTIONS PRESENTED BY PETITIONER

In addition to objecting to Petitioner's misstatements of fact and law, Respondent objects to this Court's consideration of Petitioner's third question presented. Specifically, Petitioner asks this Court to consider whether

> [a] federal court ha[s] the power to make legal the discharge of a pollutant not listed on a NPDES permit in quantities which the state permitting agency could not have permitted under its governing state law[.]

(Pet. at i, 21). Because Petitioner presents this question in terms of information that was not before the Fourth Circuit, it should not be addressed by this Court.

The thrust of Petitioner's argument here is that the Fourth Circuit's conclusion that MDE adequately contemplated the County's discharge of heat was necessarily incorrect, given a prior Maryland state appellate court decision vacating MDE's decision to approve a modification of the County's 1990 permit. (Pet. at 21). Petitioner claims that the Fourth Circuit's decision conflicts with the state court decision

because the state court held that the record in the administrative proceeding was inadequate to show that MDE had sufficient information to determine whether the proposed modification would satisfy the state water quality standards.

Petitioner's characterization of the issue, however, is misleading. The Maryland state appellate court decision to which Petitioner refers, *Woodward v. The Maryland Department of the Environment*, (Md. Ct. Spec. App., No. 1660, Sept. term 1997),[2] dealt with a 1991 proposed modification to the 1990 permit. The case before the Fourth Circuit related to alleged violations of the *original* 1990 permit, under which the County continued to operate after the *Woodward* court vacated the modified permit. More importantly, the result in *Woodward* turned on the inadequacy of the record *in that case*. The County proffered ample evidence to the District Court in *this* matter that the daily temperature of its effluent had been reported to MDE in monthly reports during the permitting process. Thus, the *Woodward* decision had no bearing on the issues presented to the Fourth Circuit,[3] and there is no conflict that warrants consideration by this Court.

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2. It should be noted that *Woodward* is an unreported decision entered by the Maryland Court of Special Appeals, which is not a state court of last resort. Thus, any conflict between the Fourth Circuit's decision and the *Woodward* decision would not rise to the level warranting consideration by this Court. *See* SUP. CT. R. 10(a).

3. The Fourth Circuit acknowledged the *Woodward* opinion, pointing out that it related to "a modification of [the] 1990 permit" whereby the County proposed to increase the volume of its effluent. The Fourth Circuit explained that the issue in *Woodward* was whether MDE had "sufficiently analyzed whether the Plant would comply with state water quality temperature standards *in discharging the increased effluent*." Because the issue turned on the 1991 modified

(Cont'd)

REASONS FOR DENYING THE WRIT

Petitioners' misstatements and mischaracterizations aside, this is not a case that warrants a writ of certiorari. The Fourth Circuit's decision is not in conflict with any decision by this Court, any state court of last resort, or any other United States Court of Appeals, nor did the Fourth Circuit depart from the accepted and usual course of judicial proceedings in deciding this matter. Moreover, this case does not present an important question of federal law that needs to be settled by this Court at this time. *Cf.* SUP. CT. R. 10.

A. The Fourth Circuit's Decision Is Not in Conflict with the Decisions of Other Courts of Appeals.

Petitioner contends that the Fourth Circuit's interpretation of the "permit shield" doctrine conflicts with the interpretations of other Courts of Appeals. First, Petitioner offers the argument that other cases have held that dischargers are confined to the "four corners of their permits." (Pet. at 12). As explained above, however, the cases Petitioner cites for this proposition do not so hold. Rather, they hold simply that a National Pollutant Discharge Elimination System (NPDES) permit is required in the first instance before a discharger may discharge any pollutants. *See Costle*, 568 F.2d at 1374; *Frezzo Bros.*, 602 F.2d at 1127-28; *Sierra Club*, 73 F.3d at 559.

(Cont'd)
permit, however, the court deemed it irrelevant, stating that "the 1990 permit is the relevant permit for this case." *Piney Run Preservation Ass'n v. County Comm'rs of Carroll County*, 268 F.3d 255, 261 n.3 (4th Cir. 2001).

The parties do not dispute that a NPDES permit is required for the discharge of pollutants. The County held such a permit in this case. The question before the Fourth Circuit related to the *scope* of that permit. The court had to determine whether the County was permitted to discharge effluent which, on occasion, exceeded the temperature of the receiving water by one to two degrees for part of the day, when the permit contained no specific limitation relating to temperature of County's effluent even after the effluent temperature had been reported to MDE. (Pet. at App. 5-6).

The only Court of Appeals decision involving a similar question is *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1994). In that case, the Second Circuit interpreted the "shield provision" of the Clean Water Act, 33 U.S.C. § 1342(k), as providing that compliance with a NPDES permit constitutes compliance with the Clean Water Act. *Id.* at 357. The court further stated that a discharger "may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." *Id.* The Second Circuit's rationale was that the purpose of a NPDES permit is to "identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements." *Id.*

The Fourth Circuit followed the rationale of the Second Circuit in *Atlantic States*, explaining that the Environmental Appeals Board of the EPA approved this reasoning. As in *Atlantic States*, the Board determined that the NPDES permit covers all pollutants disclosed to the permitting authority during the permit application process. *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964 at *12-13 (EPA 1998).

Utilizing this accepted framework, the Fourth Circuit held that the County's permit shielded it from liability under the Clean Water Act because it complied with the discharge limitations and reporting requirements of its permit, and its discharges were within the reasonable contemplation of the permitting authority at the time the permit was issued. (Pet. at App. 6). It set forth the precise testimony and documentary evidence on which it based this conclusion. (Pet. at App. 31).

Petitioner's second argument regarding a conflict among the circuits is similarly flawed. Petitioner argues that the Fourth Circuit's ruling conflicts with Ninth and Eleventh Circuit decisions holding that "citizens may sue for violations of water quality standards that have not been reduced to end-of-pipe effluent limitations." (Pet. at 17). This argument is meritless.

The Ninth and Eleventh Circuit cases cited by Petitioner indeed hold that citizens may sue for violations of water quality standards that have been incorporated into a discharger's permit. *Northwest Environmental*, 56 F.3d at 985; *Upper Chattahooochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541 551-52 (N.D. Ga. 1996). However, the Fourth Circuit's decision does not conflict with these holdings in any way. The Fourth Circuit merely determined that the permit issued to the County by MDE encompassed the effluent temperatures that had been reported to MDE throughout the permitting process. The effect of these temperatures on the state water quality standards was not addressed.

In short, Petitioner has not identified any Court of Appeals decisions that conflict with the reasoning applied

by the Fourth Circuit in this matter. On the contrary, the only Court of Appeals decision that addresses a similar issue — *Atlantic States* — is entirely consistent with the Fourth Circuit's rationale.

B. The Fourth Circuit's Decision Is Not in Conflict with any Decisions of This Court.

Contrary to Petitioner's contention, the Fourth Circuit's decision does not conflict with any of this Court's prior decisions. Petitioner's reference to *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376 (1987), and *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S. Ct. 1784 (1981), is inapposite. The Court in those cases held simply that the discharge of pollutants is prohibited in the absence of NPDES permit, which is undisputed. Neither case related in any way to the application of the shield provision of the Clean Water Act in cases where a discharger is operating in compliance with a duly authorized NPDES permit.

Petitioner also cites *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 97 S. Ct. 965 (1977), as conflicting with the Fourth Circuit's decision. This case dealt with the EPA's authority to issue regulations incorporating effluent limitations for classes of point sources. It did not relate to the scope of NPDES permits. Although a footnote at the end of the opinion discusses the shield provision as serving the "purpose of giving permits finality," *id.* at n.28, nothing in the Court's decision conflicts with the Fourth Circuit's determination here that a permit encompasses pollutants that were adequately disclosed to the permitting agency but not specifically limited in the permit.

This Court has not decided any cases that are in conflict with the Fourth Circuit's decision in this case. Accordingly, a writ of certiorari is not warranted.

C. The Fourth Circuit Followed the Accepted Course of Judicial Proceedings in Deciding This Matter.

The Fourth Circuit's lengthy opinion in this case contains a full explanation of the process used by the court in coming to its conclusion. The court explained that it utilized the two-part test spelled out in *Chevron, U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984) in interpreting the governing statutes at issue. (Pet. at App. 5-6). It then explained that it would rely on the EPA's own interpretation of the governing statute, which is appropriate under the *Chevron* analysis. (*Id.*).

Although Petitioner argues that the Fourth Circuit went beyond its authority in deeming MDE to have "issued a permit which that agency lacked the power to issue," this argument is not supported by the record. The Fourth Circuit was presented with evidence that "clearly demonstrated" that the County adequately disclosed the temperature of its effluent to MDE and that the temperature of its discharges were within the reasonable contemplation of MDE. (Pet. at App. 31). The Fourth Circuit made no determination regarding whether that information was consistent with state water quality standards; its only function was to interpret the scope of the permit issued by MDE. There simply is no support for the argument that the Fourth Circuit deviated from the accepted course of judicial proceedings in reaching its conclusion.

D. This Case Does Not Present Important Questions that Warrant Consideration by This Court.

The Fourth Circuit has broken no new ground in this matter. On the contrary, as stated above, the Fourth Circuit followed the reasoning of the Second Circuit and the Environmental Protection Agency itself in interpreting the scope of the permit issued to the County and the shield provision of the Clean Water Act. Petitioner has identified no issue that warrants review by this Court. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent County Commissioners of Carroll County respectfully opposes the Piney Run Preservation Association's Petition for Writ of Certiorari.

Respectfully submitted,

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v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ARGUMENT

Petitioner, The Piney Run Preservation Association, Inc. ("The Association") seeks *certiorari* on three issues raised by the Fourth Circuit's ruling in favor of Respondent, Carroll County ("The County"). The Association will address first the County's argument on these important substantive issues and then the County's attempt to obscure them through rhetoric. The evidence in this case is not in dispute; its legal sufficiency to establish the permit shield defense, the application of which this Court has never addressed, is.

Issue I. The Association presented three arguments in support of *certiorari* on the question of whether, under the Clean Water Act, a discharger is entitled to add a pollutant to the Nation's waters from a point source without first procuring a National Pollutant Discharge Elimination System permit which lists the amount and quantity in which that pollutant may be discharged.

1. *The intercircuit conflict on the question of whether pollutants never listed on a permit may be discharged legally*

The Association presented the intercircuit conflict on this question between The District of Columbia, Third, and Fifth Circuits, which answered the question "no," and the Second and Fourth Circuits, which answered "yes."

The County responded that the District of Columbia, Third, and Fifth Circuit opinions do not stand for the proposition for which the Association cited them. Instead, the County argued, "they hold simply that a National Pollutant Discharge Elimination System (NPDES) permit is required in the first instance before a discharge may discharge any pollutants." (Brief at 9). The County argued further that, "the question before the Fourth Circuit related to the *scope* of the permit." (Brief at 10).

The District of Columbia, Third, and Fifth Circuits cases do stand for the proposition that the Act prohibits the regulatory agency from excluding any pollutant from the requirements of the Act.

For example, in *National Resource Defense Counsel v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977), the plaintiff sought a declaratory judgment that EPA's regulations excluding "minor" polluters from the NPDES program violated the Act. The District of Columbia Circuit Court affirmed the trial court's grant of the declaratory judgment. The court reasoned:

> There are innumerable references in the legislative history to the effect that the Act is founded on the "basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful."

Id. at 1375.

Carroll County incorrectly reads these three cases as not prohibiting the discharge of pollutants in addition to those identified in a NPDES permit. The County is mistaken. The Act does not allow the discharge of any pollutant absent a permit that expressly allows the discharge of that pollutant. If the Act prevents a regulatory agency from excluding a "minor" polluter, *a fortiori* it must prevent the same agency from excluding a particular pollutant from the requirements of the Act. The three cases conflict with the Fourth Circuit's ruling in *Piney Run* and the Second Circuit's ruling in *Atlantic States Legal Foundation v. Kodak,* 12 F.3d 353 (2nd Cir. 1993), *cert.* denied 513 U.S. 811, 115 S.Ct. 62, 130 L.Ed.2d 19 (1994).

2. The conflict with Supreme Court precedent presented by the Fourth Circuit's decision that a NPDES permit allows the discharge of pollutants not identified in the permit

The Association presented the conflict between the Fourth Circuit's ruling and this Court's ruling in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52, 108 S.Ct. 376, 379, 98 L.Ed.2d 306, (1987) and *City of Milwaukee v. Illinois*, 451 U.S. 304, 310-11, 101 S.Ct. 1784, 1789, 68 L.Ed.2d 114 (1981). The *Gwaltney* analysis is similar to the analysis of the District of Columbia, Third and Fifth Circuits: the only way to avoid the Act's total proscription against discharging pollutants into navigable waters of the United States is to discharge a pollutant in accordance with the limitations and conditions expressly set forth in the discharger's NPDES permit.

The Fourth Circuit's ruling that the Act's permit shield provision in 33 U.S.C. §1342(k) licenses the discharge of a pollutant where the discharger "adequately disclosed" and the regulatory agency "reasonably contemplated" the discharge of that pollutant also conflicts with *E.I. du Pont de Nemours & Co. Train*, 430 U.S. 112, 138 n.28, 97 S.Ct. 965, 980 n.28, 51 L.Ed.2d 204 (1977). The permit shield provision means that for the duration of the permit period the discharger will be in compliance with the NPDES permit as long as it only discharges pollutants identified in the permit at levels less than the maximum level set forth in the permit.

3. The important question of federal law presented by the Fourth Circuit's decision that oral agreements between a discharger and a state, without public disclosure, become part of the permit's terms

The Association described how the ruling below presented an important federal question because the Fourth Circuit's ruling violated three fundamental precepts of the Act. First, the Fourth Circuit did not require public disclosure of the nature of the County's pollutants. Second, the Fourth Circuit's reliance on after-the-fact oral testimony by two witnesses who did not work for either Carroll County or MDE when MDE issued the permit violated EPA's internal memorandum requirement that the pollutants must

be "identified *in writing* as present ... during the permit application process...." Third, the Fourth Circuit's endorsement of oral testimony impairs the effectiveness and the efficiency of the NPDES scheme as an enforcement tool. The County made no argument with respect to these three points.

Issue II. The Association presented two arguments in support of *certiorari* on the question of whether the Fourth Circuit properly construed the "permit shield" provision in the Act to license a permit holder to discharge a pollutant in quantities that violate the applicable state water quality standard, when that pollutant is not listed on its NPDES permit.

1. The intercircuit conflict presented by the Fourth Circuit's decision to shield discharges which are illegal under state law and which could not have been listed on the permit

The Association presented the intercircuit conflict on this question between Ninth and Eleventh Circuits, which answered the question "no," and the Fourth Circuit, which answered "yes."

The County acknowledges that the rule in the Ninth and Eleventh Circuit is that "citizens may sue for violations of water quality standards that have been incorporated into a discharger's permit." (Response at p. 11). The County failed to address 40 C.F.R. §122.4, which governed MDE's issuance of the permit. That regulation provides that "No [NPDES] permit may be issued: ...(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."

Respondent attempts to distinguish the Ninth and Eleventh Circuit cases by suggesting that the lower court did not address whether the discharge violated the state water quality standards. (Response at p. 11). However, the lower court ruled that the Respondent violated the Act whenever

the temperature of its discharge violated the water quality standard for heat. App. 35, 43. The Fourth Circuit did not reverse this finding. Instead, that court ruled that the County had the license to discharge this heat because it "adequately disclosed" that it was discharging heat. Contrary to the County's assertion, the effect of these temperatures on the state water quality standard *was* addressed. The Fourth Circuit improperly ruled that the permit shield could be invoked to license a discharge expressly made illegal by the state water quality standard.

2. The conflict with Supreme Court precedent presented by the Fourth Circuit's decision that a NPDES permit allows the discharge of pollutants in violation of the state water quality standards

The Association presented the conflict between the Fourth Circuit's ruling and this Court's rulings in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 224, 48 L. Ed. 2d 578, 96 S. Ct. 2022, 2033 (1976) and *Arkansas, et al. v. Oklahoma, et al,* 503 U.S. 91, 101, 117 L.Ed.2d 239, 251, 112 S. Ct. 1046 (1992).

The County's response to this argument was that the Association "misrepresented" the law. The Association suggests that those cases stand for the proposition that citizens can sue permit holders if citizens can prove a violation of a state water quality standard.

Additionally and contrary to the County's argument, the state water quality standards were incorporated into the County's permit. The County's permit was issued pursuant to 40 C.F.R. §122.4, which provides that "No [NPDES] permit may be issued: …(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." Furthermore, General Condition II. 12 in the County's permit states: "Nothing in this permit shall be construed to … relieve the permittee from any responsibilities, liabilities, or penalties established

pursuant to any applicable State law or regulation under authority of Section 510 of the Clean Water Act of 1977 as amended." Section 510, 33 U.S.C. §1370, preserves Maryland's rights to adopt and enforce its own rules that may be more stringent than the federal standard.

Issue III. The Association seeks *certiorari* on the important federal question of whether a federal court may interpret a state-issued NPDES permit to allow the discharge of pollutant in conflict with both state law and a state appellate court's interpretation of that law.

The County argues that the Association failed to raise this issue below. The County also believes that the evidence was different in the record for the state appellate court decision. Respondent is mistaken on both counts.

The state water quality standard issue has been present in this case since the beginning. Indeed, the trial court accepted the County's suggestion that heat is a pollutant when it exceeds the water quality standard. The Association prevailed in the district court, and the County appealed. An appellee, which prevailed at trial, need not raise on appeal all the reasons for which the trial court was correct.

Second, despite the County's protestations to the contrary, the County cannot and does not direct the Court to any document in the record describing the temperature of the effluent that pre-dates the permit. Nor does the record contain the testimony of any witness who worked for either the County or MDE prior to the date that MDE issued the permit. The documents in the record are dated after MDE issued the permit. The appellate record for the state appellate case was no different.

The Association responds to the County's allegations of "misrepresentations" in the order in which they appear. The Association sets forth in *italics* the County's statements followed by the Association's response.

1. "[The Association] states that the County argued in its Motion for Summary Judgment that it could only be liable for discharges in excess of the water quality standard." (Response at 2)

The County argued unequivocally that the trial court could rule that effluent whose temperature exceeds the water quality standard is a pollutant. The County argued:

> This Court could hold as a matter of statutory construction that the Plant does not discharge "heat" within the context of the list of "statutory pollutants"...in the [Act] unless and until the discharge violates the applicable water quality regulations. *** The obvious alternative, given the water quality effluent limitations provided in the Act and according to state regulation, is that "heat" is not discharged unless the effluent temperature exceeds the temperature criteria applicable to the body of water into which the effluent is discharged – in the case of a Class III stream, the greater of 20°C or ambient. This approach harmonizes all the competing "interests" at work in the case now confronting this Court, and is consistent with the overall scope and approach of the Act as reflected in the water quality related effluent limitations set forth in section 302 of the statute.***The logical result is that "heat" is not discharged unless the water quality regulations are not satisfied.

(County's Memorandum in Further Support of Cross-Motion for Summary Judgment, filed April 23, 1999, appearing in Supplemental Joint Appendix in Fourth Circuit at pp. 31, 38, 39).

2. "[The Association] further misrepresents that the County did not introduce any evidence at trial that it had disclosed its 'addition of heat' to MDE before the 1990

permit was issued. (Pet. at 7) However, the County introduced both documentary and testimonial evidence that the temperature of its effluent was fully disclosed to MDE. The County offered the testimony of a County representative, James Slater, and a MDE representative, James Dieter.... "(Response at 2)

The central issue in this case is whether the testimony as to post-permit disclosures of a pollutant is relevant to whether those discharge are legal. The testimony of James Dieter and James Slater appear in the Fourth Circuit record at J.A. 1213-21; 1338-44. Neither testified that the County informed MDE of this fact during the 1990 application process. The County does not identify any documents to that effect.

MDE issued the permit on March 1, 1990. Mr. Dieter testified that he became an employee of MDE in 1997, seven years after MDE issued the permit. Mr. Dieter testified that he reviewed "the 1990 permit files." When counsel for the County asked Mr. Dieter if he saw "anything in the course of your review related to comments ... based upon the absence of a limitation for a temperature in the permit...," he responded, "no." Mr. Dieter spoke with unnamed MDE staff who informed him that MDE did not regulate heat from domestic wastewater treatment plants because those plants did not intentionally heat the effluent. The record does not disclose when the "unidentified staff" arrived at that erroneous legal conclusion; it was first articulated to the citizens during administrative proceedings in 1995 on the permit modification vacated in *Woodward v. MDE.*

Mr. Slater testified that he became an employee of Carroll County in May 1990, two months after the permit was issued. He testified that the Commissioners disclosed the temperature of the Plant's effluent to MDE for "[a]s long as I have knowledge of it, ... which is back to 1990." He did not testify that the Commissioners provided this information to MDE during the application process. Furthermore, knowledge of the temperature of the effluent does not allow

one to answer the question of whether the Plant is adding heat to the stream. In order to answer this question, one must know the temperature of the receiving water. There is no evidence that the Commissioners communicated to MDE during the application process that the temperature of the effluent was warmer than the temperature of the receiving water, or by what amount. Indeed, Mr. Slater testified he first became aware in 1992 or 1993 that the Plant was discharging heat when the Plaintiff brought it to his attention.

3. "[The Association] misstates that temperature data collected by the County between 1996 and 1998 showed that the County added 'thermal pollution' to the stream on 371 of 397 days measured." (Response at 3)

In *Piney Run I,* the district court reviewed the summary judgment exhibit that contained the 1996-1998 temperature data and stated, "the temperature of the plant effluent has exceeded the upstream temperature on 371 of 397 days." (emphasis supplied)(App. 59). The lower court relied on this data to grant summary judgment against the Respondent. The trial court rejected the Respondent's efforts to impeach its own temperature data, and this Court should, too. Furthermore, there is no evidence to support the County's new argument that the temperature was taken "*in the pipe.*" Finally, Respondent's argument that "on some days" the temperature of the effluent "was one or two degrees higher than the stream temperature at various upstream locations" is only partly correct. (Brief at 3). At some times on some days, the temperature differential was one or two degrees Celsius. However, the record shows that on many days the temperature differential was at least three degrees Celsius. *See* Joint Appendix 251-255. A three degree Celsius differential is a more than a five degree Fahrenheit differential.

4. The Fourth Circuit followed the reasoning of the ... Environmental Protection Agency." (Brief at 14).

The Fourth Circuit accorded *Chevron* deference to EPA's old interpretation of the permit shield defense. EPA promulgated its current interpretation in 1995. (This document appears in the Fourth Circuit record at Addendum pp. 2-3 to the brief of the *amicus* Industry Groups). The 1995 version "[clarifies] that a discharger must provide the information in writing for the permit record in order to obtain the authorization to discharge and the shield provided by a [NPDES] permit." Thus, the pollutants must be identified in writing as present ... during the permit application process and contained in the administrative record which is available to the public." This Court's decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984) does not contemplate deference to a position which the agency itself has abandoned. *Christenson v. Harris County,* 120 S. Ct. 1655, 1662 (2000). The Fourth Circuit cited *Atlantic States Legal Foundation v. Kodak* with approval. That court deferred to an old EPA memorandum, 12 F.3d 357, and did so before this Court decided *Christenson.* The Fourth Circuit disregarded the *Christenson* standard when it cited *Atlantic States.*

CONCLUSION

For the reasons stated above, and in its Petition, Petitioner respectfully requests that this Court grant Certiorari in this case.

Respectfully submitted,

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